(1) No. 97 • 133 JUL 2 1 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

DAVID CHARLES ZIMOMRA, On Behalf Of Himself And All Others Similarly Situated,

Petitioner,

vs.

ALAMO RENT-A-CAR, INC., AVIS, INC., BUDGET RENT A CAR CORPORATION, DOLLAR RENT-A-CAR SYSTEMS, INC., HERTZ CORPORATION, NATIONAL CAR RENTAL SYSTEM, INC., THRIFTY RENT-A-CAR SYSTEMS, INC., VALUE RENT-A-CAR, INC., ENTERPRISE LEASING CO. OF DENVER, NATIONAL CAR RENTAL, RESORT RENT-A-CAR, INC., STEAMBOAT SPRINGS RENTAL AND LEASING, INC., TRYND, INC., TIARA ENTERPRISES, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID BOIES
BOIES & McINNIS
5408 Port Royal Road
Springfield, Virginia 22151
(703) 764-8700

GERALD BADER
Counsel of Record
STEVEN M. FEDER
BADER, VILLANUEVA & FEDER
1660 Wynkoop Street
Suite 1100
Denver, Colorado 80202
(303) 534-1700

Attorneys for Petitioner

71591 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

99 PP

QUESTIONS PRESENTED

1. Is the enactment of a municipal ordinance adopting a price-fixing agreement among private competitors sufficient in and of itself to confer antitrust immunity on private parties under the state action immunity doctrine?

2. Is a private party seeking immunity for price-fixing under the state action doctrine required to demonstrate that the state has clearly contemplated and intended the displacement of price competition in the particular market in which the price-fixing occurred?

3. Does the *Noerr-Pennington* doctrine immunize a price-fixing agreement among private parties when those private parties would have carried out the price-fixing agreement irrespective of whether the municipal ordinance they were lobbying for was ultimately enacted?

4. Should courts apply both the clear articulation and active supervision prongs of the state action doctrine to a municipal ordinance which regulates private parties and purports to immunize a private price-fixing agreement?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	1
A. Background of the Case	2
B. The Proceedings Below	4
C. Essential Facts	5
Reasons for Granting the Writ	6
I. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings On The Importance Of *Both* Prongs Of The State Action Immunity Test.	6
II. The Petition Should Be Granted Because The Opinion Below Fundamentally Misinterprets This Court's Holding In *Town of Hallie*.	9

Contents

Page

III. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Most Recent State Action Immunity Decision. 13

IV. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings On The "Clear Articulation And Affirmative Expression" Prong Of The State Action Immunity Test. 15

V. The Petition Should Be Granted Because The Opinion Below Mistakenly Applies The *Noerr-Pennington* Doctrine To This Case. 20

Conclusion 21

TABLE OF CITATIONS

Cases Cited:

California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ... 9, 10, 11, 12, 13, 14

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) 15

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 6, 7, 8, 15

FTC v. Ticor Title Insurance Co., 504 U.S. 621 (1992) 7, 13, 14, 19, 22

Contents

	Page
Hoover v. Ronwin, 466 U.S. 558 (1984)	8
Parker v. Brown, 317 U.S. 341 (1943)	2
Patrick v. Burget, 486 U.S. 94 (1988)	14
Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985)	10, 11, 12, 15
Town of Hallie v. City of Eau Claire, 471 U.S 34 (1985)	8, 9, 10, 11, 12, 13, 14
Statutes Cited:	
28 U.S.C. § 1254(1)	1
Colorado Revised Statutes:	
§§ 29-3-101, *et seq.*	1, 18
§ 29-3-106(5)	18
§ 29-3-114	19
§§ 41-3-101, *et seq.*	1
§ 41-3-102	15
§ 41-3-106(e)	16
§ 41-3-107	16
§§ 41-4-101, *et seq.*	1, 16
§ 41-4-106	16, 17

Contents

Page

Rule Cited:

Fed. R. Civ. P. 12(b)(6) 2, 5

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Tenth Circuit Filed April 22, 1997 . 1a

Appendix B — Order of the United States District Court for the District of Colorado Filed February 23, 1996 ..... 27a

Appendix C — Excerpts of Ordinance 863, Series 1993, City and County of Denver, Colorado 41a

Appendix D — Excerpts from Colorado Revised Statutes §§ 29-3-101, *et seq.* (County and Municipality Development Revenue Bonds) 55a

Appendix E — Excerpts from Colorado Revised Statutes §§ 41-3-101, *et seq.* and 41-4-101, *et seq.* (Public Airports) 65a

Petitioner David Charles Zimomra respectfully requests that a writ of certiorary be issued to review the judgement of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495 (10th Cir. 1997) (App. A). The opinion of the United States District Court for the District of Colorado in *Zimomra v. Alamo Rent-A-Car, Inc.*, No. 94-S-2148 (D.Colo. Feb. 23, 1996) is unpublished (App. B).

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals for the Tenth Circuit was entered on April 22, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Ordinance No. 863 Series 1993, City and County of Denver, Colorado (App. C);

Colorado Revised Statutes §§ 29-3-101, *et seq.* (App. D);

Colorado Revised Statutes §§ 41-3-101, *et seq.* (App. E);

Colorado Revised Statutes §§ 41-4-101, *et seq.* (App. E).

STATEMENT OF THE CASE

The fundamental issue in this petition is whether a private antitrust defendant must satisfy both prongs of the state action

immunity test as established by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. This issue arises in the context of a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) filed by defendants, granted by the United States District Court for the District of Colorado ("District Court") prior to the taking of any discovery, and affirmed by the United States Court of Appeals for the Tenth Circuit ("Court of Appeals").

A. Background of the Case

The material facts in this case are straightforward and, for purposes of this petition, uncontroverted.

In the late 1980's, the City of Denver decided to replace Stapleton International Airport ("Stapleton") with the larger Denver International Airport ("DIA"). Faced with the prospect of having to pay for new facilities at DIA, the defendant rental car companies met privately among themselves, exchanged pricing and other business information, and discussed ways to finance their new facilities. As a result of these meetings, and to avoid competing with each other over how much of the cost of their new facilities would be passed on to their customers, the defendants agreed among themselves to add a uniform $2.98 per day surcharge to each of their respective customers' bills. Neither the City of Denver nor the State of Colorado participated in, or even was aware of, these discussions or the resulting agreement to add the $2.98 per day surcharge.[1]

After having been advised by counsel that the agreement they had entered into was a per se violation of the Sherman Antitrust

1. Indeed, officials of the City of Denver have repeatedly, uniformly, and unequivocally stated, both before and after passage of Denver Ordinance 863, that the surcharge was the result of a private, voluntary agreement among the defendants. Recognizing the obvious antitrust implications of defendants' price fixing agreement, the City insisted upon, and ultimately obtained, complete indemnity by the defendants for all costs and liabilities, including attorney fees, in connection with any antitrust claims relating to the Ordinance.

Act, the defendants then sought, and ultimately obtained, passage of Denver Ordinance 863 (the "Ordinance") in an effort to retroactively immunize their anticompetitive conduct, including their agreement to impose the uniform surcharge on their customers. The Ordinance was drafted by defendants and their counsel and set the initial amount of the surcharge at the exact amount that the defendants had privately agreed among themselves to charge. Prior to the enactment of the Ordinance, the City of Denver never conducted any study, performed any analysis, or made any finding relating to the reasonableness of the surcharge or its amount. Indeed, other than enacting the Ordinance, the City of Denver did absolutely nothing to actively supervise defendants' conduct either before or after the Ordinance went into effect, but instead merely passively adopted the private price fixing arrangement previously entered into by the defendants.

Though the Ordinance contains a provision by which future changes in the amount of the surcharge are determined, the City of Denver has absolutely no power or authority under the Ordinance to change the amount of the surcharge no matter how high or unreasonable it may become. Rather, the defendants themselves have exercised, and continue to exercise, control over the amount of the surcharge in a number of direct and indirect ways. *First*, of course, the initial amount of the surcharge was determined entirely by a private agreement among the defendants without any oversight or control by the City of Denver. *Second*, the ultimate power to change the amount of the surcharge rests in the hands of a consultant (App. C at 50a-52a) chosen by the defendants themselves and who reports to a managing committee (App. C at 45a-46a) consisting entirely of the defendants[2] (no City of Denver official even has the

2. This managing committee is granted broad authority under the ordinance in addition to the power oversee the consultant, including the power to: (a) direct the investment of the proceeds of the surcharge; (b) review "confidential" pricing and other business information of competing defendants; (c) oversee the expenditure of the $65,000,000 in bond proceeds; (d) replace or substitute members of the committee; and (e) retain legal counsel, financial consultants, and other service providers.]

authority under the Ordinance to attend, let alone actively participate in, the meetings of this managing committee). *Third*, the guidelines used by defendants' consultant to adjust the amount of the surcharge include a provision for "Administrative Expenses" (App. C at 41a-43a) over which the defendants have broad discretion.[3] By increasing the amount of "Administrative Expenses" incurred (such as by shifting otherwise ordinary business expenses into the Administrative Expense accounts), defendants can trigger an increase in the amount of the surcharge, again without any supervision or control by the City of Denver. (App. C at 50a). *Fourth*, the consultant is required by the Ordinance to consult with the defendant-controlled managing committee before making a proposal concerning any changes to the amount of the surcharge. (App. C at 51a). The consultant is also required under the Ordinance to "tak[e] into account as deemed appropriate" any objections that any of the defendants have to any changes in the amount of the surcharge. (App. C at 50a-52a).

B. The Proceedings Below

In July 1994, petitioner David C. Zimomra filed suit in the United States District Court for the Eastern District of Virginia (the "Virginia Court") against eight rental car companies operating at Stapleton Airport for damages and injunctive relief under the Sherman Antitrust Act and various state causes of action. The Virginia Court transferred the case to the United States District Court for the District of Colorado (the "Colorado District Court") in September 1994. In November 1994, petitioner filed a substantially similar complaint against six additional rental car

---

3. The defendants' manipulation of this Administrative Expense provision is significant. Since 1993, at least $5,000,000 (and possibly much more) in proceeds from the surcharge have been spent on Administrative Expenses. Moreover, because the definition of Administrative Expenses under the Ordinance is so broad, defendants can convert what would otherwise be ordinary business expenses into costs paid directly by their customers through the imposition of the surcharge.

companies and the Colorado District Court consolidated both actions. Concluding that defendants' conduct was immune from antitrust scrutiny under the state action doctrine, the Colorado District Court dismissed plaintiff's complaints pursuant to Fed. R. Civ. P. 12(b)(6) against all but one of the defendants in February 1996 and against the remaining defendant in April 1996. The Colorado District Court did not permit any discovery, hold an evidentiary hearing, or permit oral argument prior to dismissing the case. Petitioner timely filed an appeal to the United States Court of Appeals for the Tenth Circuit. The parties submitted their respective appellate briefs in the latter part of 1996 and oral argument was made in March 1997. The Tenth Circuit issued a written opinion affirming the judgement of the Colorado District Court on April 22, 1997. Petitioner timely filed this writ of certiorari seeking review the Court of Appeals decision.

C. Essential Facts

This case ultimately rests on five essential and uncontested facts. *First*, the defendant rental car companies privately met among themselves, exchanged pricing information, and agreed to impose a uniform surcharge on their respective customers without the participation or knowledge of the City of Denver. *Second*, defendant rental car companies agreed among themselves that the initial amount of the surcharge would be $2.98 per day, again without the participation or knowledge of the City of Denver. *Third*, the defendant rental car companies and their consultant are private parties who exercise at least some degree of control over future increases in the amount of the surcharge and how the proceeds of the surcharge are spent. *Fourth*, subsequent to defendants agreement to impose the surcharge, the City of Denver enacted Ordinance 863 which "compels" defendants to charge and collect the surcharge from their customers. *Fifth*, the City of Denver has not taken a single concrete step to actively supervise defendants' conduct other than the enactment of the Ordinance.

In sum, this case involves a classic horizontal price-fixing scheme wholly orchestrated by defendants to shift the entire cost of their new facilities (and then some) onto the traveling public to avoid competing with each other over how much of such costs would be passed on to their customers and how much absorbed as a business expense. As the court below and defendants themselves concede, there is no doubt that, in the absence of state action immunity, defendants conduct would constitute a clear per se violation of the Sherman Antitrust Act.

This case thus turns on the answer to a single simple question:

Is the mere enactment of Ordinance 863 sufficient in and of itself to confer antitrust immunity on the defendants and thereby allow this price-fixing arrangement among private competitors to escape antitrust scrutiny?

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE IMPORTANCE OF *BOTH* PRONGS OF THE STATE ACTION IMMUNITY TEST.

In a long and unbroken chain of state action cases, this Court has made clear that *private parties* seeking immunity for violations of the federal antitrust laws must satisfy two requirements. First, the statute or ordinance purportedly conferring immunity must be enacted pursuant to a clearly articulated and affirmatively expressed state policy to displace competition in the relevant market. Second, the city or state must actively supervise the private parties' anti-competitive conduct. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) ("*Lafayette*") (Private parties seeking

immunity must show that the anti-competitive restraint was "clearly articulated and affirmatively expressed as state policy, and that the state's policy was actively supervised"). *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 636 (1992).

In a striking departure from this Court's well settled precedent, the court below eliminated the second prong of the state action immunity test by holding that active supervision is not required in this case "because there is little, if any, risk of defendants doing anything other than complying with the City and County's mandate." (App. A at 10a). But as this Court has uniformly emphasized, the fact that private parties are purportedly compelled to comply with a city or county's mandate is only the *beginning* of the state action analysis, not the end of it. *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 637 (1992)

As this Court has repeatedly and *without exception* held, the anti-competitive conduct of private parties can only escape antitrust scrutiny if *both prongs* of the state action test are satisfied. Indeed, in the nearly twenty years since the two-prong test was first established in *Lafayette*, this Court has decided no fewer than five state action cases involving private parties, and every one them required both clear articulation *and* active supervision:

> *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc*, 445 U.S. 97, 105 (1980) ("*Midcal*") (This Court's state action "decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second the policy must be 'actively supervised' ").
>
> *Southern Motor Carriers Rate Conference, Inc. v. U.S.*, 471 U.S. 48, 57 (1985)

("*Southern Motor Carriers*") ("We set forth a two prong test for determining whether state regulation of private parties is shielded from the federal antitrust laws").

321 Liquor Corp. v. Duffy, 479 U.S. 335, 343 (1986) ("Our decisions have established a two prong test for determining immunity under Parker v. Brown").

Patrick v. Burget, 486 U.S. 94, 100 (1988) ("*Patrick*") (This Court has "established a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws").

FTC v. Ticor Title Insurance Co., 504 U.S. 621, 636 (1992) ("*Ticor*") (This Court's "insistence on real compliance with both parts of the Midcal test will serve to make clear that the state is responsible for the price fixing it has sanctioned").

Moreover, even in this Court's decisions relating to conduct exclusively engaged in by state and local governmental units, the applicability of the two-prong test to *private parties* has not been questioned. *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984). *Town of Hallie v. City of Eau Claire*, 471 U.S 34, 46 (1985) ("*Town of Hallie*").

In sum, the lower court's failure to apply both prongs of the state action immunity test to this case, where the involvement of private parties is clear and pervasive, disregards every state action decision of this Court since *Lafayette*. If this opinion is allowed to

stand, the active supervision requirement — heretofore considered essential to the effective enforcement of the nation's antitrust laws — will be substantially weakened. Indeed, at least in the Tenth Circuit, the active supervision requirement will disappear altogether in cases involving private price-fixing arrangements which have been adopted, and purportedly immunized, by municipal ordinance.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW FUNDAMENTALLY MISINTERPRETS THIS COURT'S HOLDING IN *TOWN OF HALLIE*.

As discussed above, this Court has established a black letter rule governing whether the two-prong *Midcal* test or the single-prong *Town of Hallie* test applies to a particular case: if private parties are involved, courts must apply both prongs of the state action doctrine; if the case involves only unilateral municipal action without any participation of, or regulation over, private parties, courts need only examine whether the state has a clearly articulated and affirmatively expressed policy to replace competition with regulation in the relevant market.

The opinion below has now rejected this rule. In its place, the court below offers a new rule of its own creation: active supervision of private price-fixing agreements which have been purportedly immunized by municipal ordinance is not required where there is "little, if any, risk of defendants doing anything other than complying with the [municipality's] mandate." (App. A at 10a). An even more troubling corollary to this new rule is that active supervision of private parties is *never* required when an antitrust plaintiff could have named a municipality as a defendant in addition to the private parties that were named. (App. A at 10a-12a).

The court below arrives at these startling new rules by

improperly extending this Court's holding in *Town of Hallie* (where there was no involvement by private parties whatsoever) to *every* case involving a municipal ordinance purporting to immunize not only anticompetitive conduct by the municipality itself (as was the case in *Town of Hallie*), but conduct of private parties as well. Critical to the lower court's decision was the erroneous (and chronologically impossible) proposition that for every case involving municipalities, *Town of Hallie* "does away with the active supervision prong" (App. A at 24a) established in *Midal* and reaffirmed in numerous Supreme Court cases subsequent to *Town of Hallie*, as well as the *Southern Motor Carriers* case decided the very same day.

Due to its critical role in the opinion below, this court's holding in *Town of Hallie* merits close examination. In *Town of Hallie*, this Court addressed the issue of whether a municipality's unilateral anti-competitive conduct must be supervised by the state in order for the municipality to receive antitrust immunity. The case was brought by the Town of Hallie and other Wisconsin townships against the City of Eau Claire alleging that Eau Claire's refusal to provide sewer services to the townships was a violation of the Sherman Antitrust Act. Finding that the State of Wisconsin had a clear and affirmatively expressed policy permitting Eau Claire to refuse to provide sewer services to the townships, this Court went on to consider the active supervision prong of the state action doctrine. Reasoning that it would be superfluous to require the state to supervise a municipality's unilateral conduct when the state had already implicitly approved of the municipality's activities by passing a state law permitting it to do what it did, this Court held that municipalities acting unilaterally and without any involvement of private parties only had to satisfy the first prong of the state action doctrine. Crucial to this Court's decision was the fact that there was no danger that Eau Claire was "involved in a private price-fixing arrangement" or that private parties were advancing their own interests rather than the interests of the public. (*Town of Hallie* at 47).

The lower court's application of the *Town of Hallie* single-prong test to the present case is fundamentally flawed for at least three important reasons. First, the *Town of Hallie* decision itself makes clear that its holding applies only to municipalities (and possibly other political subdivisions), not to private parties. By reaffirming this Court's holdings in *Midcal* and *Southern Motor Carriers*, the *Town of Hallie* Court expressly recognized that where private parties are involved, "active supervision must be shown". (*Id.* at 46). In the present case, it can scarcely be denied that the rental car defendants are private parties and that they were involved in extensive anticompetitive conduct.[4] The defendants collectively determined the initial amount of the surcharge; the defendants met, and still meet, privately among themselves and exchange pricing and other business information; the defendants' consultant, not a city employee, has the power to increase the amount of the surcharge; a managing committee consisting entirely of the defendants is granted broad oversight powers under the Ordinance; the defendants collectively decided to separately itemize the surcharge on their customers bills after the Ordinance was passed. In short, to characterize the defendants surcharge scheme as anything other than "essentially a private price-fixing arrangement", and to characterize the Ordinance as anything other than a "gauzy cloak of state involvement", is to exalt form and deny substance.

Second, this Court's decision in *Southern Motor Carriers* (issued the very same day as *Town of Hallie*) unequivocally held that whenever private parties seek to shield themselves from antitrust scrutiny they must satisfy both prongs of the state action test. (*Southern Motor Carriers* at 57). Moreover, even if private parties play no role whatsoever in determining "price or rate structures" (App. A at 9a), the active supervision prong must still

4. The court below explicitly recognized that the defendants participated in setting future adjustments in the amount of the surcharge through the "interaction of a 'Managing Committee', which is composed of a representative from each car rental company" and the defendants' consultant. (App. A at 3a).

be applied. All that is required to trigger the application of the active supervision prong is that a city regulate private parties. It does not make any difference how much "discretionary authority" defendants have or whether the city is the "effective decision maker" (App. A at 9a) — the proper test to apply whenever a city regulates private parties is the two prong *Midcal* test, not the single prong *Town of Hallie* test applied by the court below:

> We set forth a two-pronged test for determining whether state *regulation of private parties* is shielded from the federal antitrust laws. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy. Second, the state must supervise actively *any* private anticompetitive conduct.

(Emphasis added) (internal quotation marks and citations omitted) (*Southern Motor Carriers* at 57).

Third, the lower court's reasoning that it should apply the single prong *Town of Hallie* test to this case because that is the test it would have applied to the City of Denver if petitioner had sued the City is fatally flawed. As the court recognizes (albeit in support of the contrary conclusion) (App. A at 11a), the identity of the named defendants is, under most circumstances, immaterial for a determination as to which test to apply; what is important is whether or not private parties are involved. Thus, even if petitioner had sued the City of Denver, the proper test to apply to both the rental car defendants *and* the City would be the *Midcal* two-prong test because there is clearly private involvement in the surcharge regime and the Ordinance clearly regulates private parties. ("We set forth a *two-pronged test* for determining whether state *regulation of private parties* is shielded from the federal antitrust laws." (*Southern Motor Carriers* at 57). Moreover, even if the proper test to apply to a municipal defendant *is* the single-prong *Town of Hallie* test, there

is nothing necessarily "illogical" (App. A at 11a) about applying a different test to a private defendant — courts and legislatures routinely provide cities and other governmental units with powers, privileges, and immunities that are not available to private parties.

In short, the court below was led to its "anomalous result" (App. A at 26a) by fundamentally misinterpreting this Court's holding in *Town of Hallie*, ignoring the plain meaning of every Supreme Court state action case dealing with private parties, and reducing its analysis of the present case to the "purely formalistic inquiry" (*Town of Hallie* at 39) explicitly rejected by this Court in that decision (though even a purely formalistic inquiry would have revealed that the Denver Ordinance regulated private parties and that, therefore, the proper test to apply was the two-prong *Midcal* test).

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S MOST RECENT STATE ACTION IMMUNITY DECISION.

The opinion below reveals a remarkable disregard for this Court's most recent state action case — the 1992 decision in *Ticor*. Inexplicably, the opinion of the court below did not even mention this decision (indeed, the concurring opinion cites *Ticor* only to cast doubt on the normative wisdom of the court's decision). Though it is understandable that the court below found little in *Ticor* to support its opinion, the applicability and importance to the present case of this Court's holding in *Ticor* is obvious and overwhelming. In particular, *Ticor* reaffirms three bedrock principles of the state action doctrine that, had they been faithfully applied by the lower court to the present case, would have inexorably led to the contrary result.

First, *Ticor* reaffirms the long-standing rule of this Court that "where private parties participate in a price-fixing regime", the two-prong *Midcal* test, not the single-prong *Town of Hallie* test, is applied (*Ticor* at 633). That the rental car defendants "participated" in the "price-fixing regime" challenged here is, of course, undeniable.

Second, *Ticor* reaffirmed and solidified this Court's unanimous holding in *Patrick* that a city or state must not only *possess* the power to actively supervise the anticompetitive conduct of private parties, but it must as factual matter *exercise* that power. (*Id.* at 634) ("In the absence of active supervision *in fact*, there can be no state action immunity for what were otherwise private price-fixing arrangements") (emphasis added) (*Id.* at 638). Because the court below found that the mere passage of the Ordinance was sufficient in itself to immunize defendants' price-fixing agreement, it did not even look at what the City of Denver actually *did* to exercise whatever power the City supposedly possessed under the Ordinance. Indeed, because petitioner was denied any discovery whatsoever in the proceedings below, the only "evidence" of active supervision the court below could have examined was the judicially noticed Ordinance itself.

Third, this Court in *Ticor* made clear that state action immunity is disfavored and must be construed narrowly. (*Id.* at 635-636). Had the court below embraced this Court's admonition against broadly interpreting state action immunity, it would have been far less eager to expand the single-prong *Town of Hallie* test to a case that so clearly involves private parties.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE "CLEAR ARTICULATION AND AFFIRMATIVE EXPRESSION" PRONG OF THE STATE ACTION IMMUNITY TEST.

This Court has made clear that a municipal ordinance purportedly immunizing a price-fixing agreement among private competitors must be enacted pursuant to a clearly articulated and affirmatively expressed state policy to displace competition in the relevant market. (*Southern Motor Carriers* at 64). Although it is not required that a state statute specifically state that competition may be displaced in the particular market, the challenged conduct must be clearly contemplated by the state (*Lafayette* at 415), and be the clearly foreseeable result of the state authorization. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991).

Applying this standard to the present case, the respondents must show that the state of Colorado clearly contemplated that the rates that rental car companies charge their customers would be displaced at least in part by municipal regulation, and that the municipal adoption of a private price-setting agreement among competitors was the clearly foreseeable result of some state statute.

The court below purportedly found this requisite state authorization in several provisions of the Colorado Revised Statutes. The first provision cited by the court below is C.R.S. 41-3-102, (App. E at 65a) which "provides cities, towns, and counties in Colorado with the right to create 'airport authorities' for the 'purpose of acquiring and improving airports, . . . and related facilities.' " (App. A at 13a). Though clearly authorizing counties and cities to acquire and improve airports and related facilities, this provision says absolutely nothing about authorizing municipalities to set the

rates charged by vendors such as rental car companies at those airports.

The second provision cited by the court below, C.R.S. 41-3-106(e), (App. E at 65a) "provides airport authorities in Colorado with the power to 'borrow money and . . . issue bonds payable in whole or in part from the income of the authority and otherwise secured to the extent provided by law.' " (App. at 13a). At first glance this provision may appear to authorize the City of Denver to enact the Ordinance and issue the bonds at the heart of this case (and that is precisely how the court below read it). However, a close reading of Article 3 together with a reading of the Ordinance clearly shows that the bonds at issue in this case are altogether different than the bonds authorized by this provision. The bonds at issue in this litigation are fully taxable Special Facilities Bonds whereas the bonds authorized under Article 3 specifically provide that "bonds issued under this article and the income therefrom shall be free and exempt from taxation by the state." C.R.S. 41-3-107. Thus, it is a legal impossibility that the bond ordinance at issue in this case was authorized by the statute cited by the court below. Moreover, even if the bonds were authorized under Article 3, there is nothing in that provision that remotely indicates that the State of Colorado intended that rental car prices would be set by municipal ordinance.

The third provision cited by the court below (App. At at 13a) declares that various airport activities engaged in by airport authorities are deemed "public governmental functions, exercised for a public purpose, and matters of public necessity." C.R.S. 41-4-101. (App. E at 68a). Again, there is absolutely nothing in this provision expressing (clearly, affirmatively, or otherwise) any intention by the State of Colorado to displace competition in the rates that airport vendors charge their customers.

The fourth provision, C.R.S. 41-4-106, (App. E at 69a) is the provision most heavily relied on by the court below as authorizing the anticompetitive conduct at issue in this case:

> **41-4-106. Operation of airports.** In connection with the erection, maintenance, and operation of any such airport or navigation facilities, any county has the power and jurisdiction, when acting singly, or by agreement, when acting jointly with any other county, city and county, city, or town, to regulate the receipt, deposit, and removal and the embarkation of passengers or property to or from such airports; to exact and require charges, fees, and tolls, together with a lien to enforce their payment; to lease or assign for operation such space or area, appurtenances, appliances, or other conveniences necessary or useful in connection therewith; to own and operate aircraft; to employ pilots; to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport, landing field, and navigation facilities; to perform any duties necessary or consistent for the regulation of air traffic; to enter into contracts or otherwise cooperate with the federal government or other public or private agencies; and to exercise such powers as may be required or consistent in the promotion of aeronautics and the furtherance of commerce and navigation by air.

Although the above provision clearly grants to the City and County of Denver the power "to exact and require charges, fees, and tolls", it is clear from the second part of that phrase ("together with a lien to enforce their payment") that what the State of Colorado was authorizing was the *county's* charging of "charges,

fees, and tolls" to those who use airport facilities. It is one thing to charge the taxicabs, buses, and other service providers at airports fees and tolls for their use of airport facilities. It is another thing altogether to set by municipal ordinance the prices that those service providers in turn charge their customers. There is simply nothing in this provision that indicates that the State of Colorado "clearly contemplated and intended" that the prices that rental car companies charge their customers would be set by anything other than competition in an open market. To interpret this provision as broadly as the court below did is to eliminate the clear articulation and affirmative expression prong altogether. Under the lower court's reading of this provision, the rental car companies would be free to seek municipal ordinances blessing all manner of private anticompetitive restraints, including, for example, minimum rates for certain types of cars and collectively set refueling charges. Indeed, competitors in every one of the scores of industries that do business at any of Colorado's airports would be "clearly and affirmatively" authorized to seek whatever type of anticompetive price restraints their political clout would enable them to obtain from a municipality.

The court below also cites several provisions of the State of Colorado County and Municipality Revenue Bond Act, C.R.S. 29-3-101, *et seq.*, (App. D) (the "Bond Act") as supplying a clearly articulated and affirmatively expressed state policy permitting the anticompetitive conduct at issue in this case. But again, the bonds that the Bond Act authorizes are tax exempt bonds (C.R.S. 29-3-106(5)), (App. E at 62a-63a) not the fully taxable Special Facilities Bonds at issue in this case. And again, to read the Bond Act as broadly as the court below did would eviscerate the clear articulation prong: in addition to the sweeping scope of the language cited by the court below (App. A at 14a), the Bond Act would also authorize anticompetitive municipal ordinances relating to "hospital care", "residential housing", "sewage", "recreation activities", "conventions", "trade shows", "storage or training facilities", "sports and recreation facilities", and "research, product testing,

and administrative facilities." (App. D at 55a-56a). If the lower court's reading of this provision is correct, the State of Colorado through the Bond Act has clearly articulated its intent to displace price competition with regulation in each of these broad areas of commerce. Such an interpretation would create precisely the type of "attractive nuisance in the economic sphere" that motivated this Court in *Ticor* to narrowly construe state action immunity. (*Ticor* at 637).

But perhaps the clearest indication that the State of Colorado did not intend for the Bond Act to provide broad authority for municipalities to sanction price-fixing of consumer prices can be found in the Act at C.R.S. 29-3-114 (App. D at 63a-64a):

> Prior to the issuance of any bonds authorized by this article, the county or municipality shall enter into a financing agreement with respect to the project with a *user providing for payment* to the county or municipality . . . and to pay the costs of maintaining the project in good repair and keeping it properly insured, unless the financing agreement obligates the *user* to pay for the maintenance of and insurance on the project.

(Emphasis added). It is clear from this provision that "user" means the company that leases or otherwise occupies the project financed by the revenue bonds, not the customers of that company. Indeed, notwithstanding defendants' attempts throughout this litigation to characterize this price-fixing regime as just another garden variety bond financing, respondents have not brought to the attention of either the District court or the court below a single example of a similar bond ordinance that requires the *customers* of the beneficiaries to pay the principal and interest on the bonds (much less to be forced to do so as a result of a private agreement among supposed competitors).

In short, there is nothing in any of the state statutes cited by the court below that suggests, let alone clearly articulates and affirmatively expresses, any intention by the State of Colorado to displace price competition as the means by which rental car rates are determined or even to subject those rates to regulation.

V.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW MISTAKENLY APPLIES THE *NOERR-PENNINGTON* DOCTRINE TO THIS CASE.

The *Noerr-Pennington* doctrine has nothing to do with this case. As petitioner has maintained throughout this litigation, the First Amendment right of defendants to lobby the City of Denver has never been challenged. What petitioner *has* challenged is the private agreement among the rental car defendants to impose an anticompetitive surcharge on the traveling public.

As the evidence in this case will clearly demonstrate, defendants met privately among themselves, shared pricing and other business information, and agreed to collectively impose a $2.98 per day surcharge on each of their customers. As the evidence will further show, defendants entered into this arrangement and agreed to carry it out prior to, and entirely independent of, any decision to seek or lobby for a municipal ordinance. Moreover, even after defendants started lobbying for the Ordinance, they intended to go forward with the surcharge even if the Ordinance was ultimately not enacted. While this decision appears ill advised from an antitrust perspective, defendants had some powerful reasons to proceed with their surcharge scheme even in the absence of an ordinance immunizing their conduct. First, defendants believed (and argued in the proceedings below), that the surcharge was not anticompetitive, and therefore not illegal even without the Ordinance because the prices to which the surcharge were added were supposedly set by competition. (While the District Court based

its decision in part on its acceptance of this argument, the court below did not address it). Second, the enormous amount of money generated by surcharge was, in defendants view, worth whatever antitrust risk it entailed.

Even if defendants did *not* intend to proceed with the imposition of the surcharge in the absence of the Ordinance, the *Noerr-Pennington* doctrine is still irrelevant to this case. Either the state action doctrine immunizes the surcharge regime at issue in this litigation or it does not. If it does, defendants actions are beyond the reach of the antitrust laws, and there is no need for any further protection under *Noerr-Pennington*. If it does not (because either the Ordinance was not enacted pursuant to a clearly articulated and affirmatively expressed state policy to displace competition or the City did not actively supervise), the fact that defendants lobbied for the Ordinance does not somehow bring the regime back within the protection of the state action doctrine. Either way, the *Noerr-Pennington* doctrine adds nothing to the analysis of the issues before this Court.

CONCLUSION

In a long line of state action cases, this Court has carefully balanced the parochial interests of local governments with the national interest in free and open markets as reflected in the federal antitrust laws. Critical to the striking of that balance has been this Court's insistence on real compliance with both prongs of the state action doctrine whenever private parties have sought anticompetitive bargains through their influence on the workings of local government. That balance has been fundamentally altered by the opinion of the court below.

If allowed to stand, the opinion below would greatly expand the ability of private parties to obtain antitrust immunity for anticompetitive conduct under the state action doctrine and severely hamper the enforcement of this nation's antitrust laws. The combination of the lower court's elimination of the active

supervision prong for municipally blessed private price-fixing agreements together with its expansive reading of the clear articulation prong could produce a virtual explosion of wholly unsupervised anticompetitive county and municipal ordinances and regulations.

There are over 60,000 local governmental units in the United States, all of which have been granted some authority by the states to regulate certain aspects of the economy. If the opinion below becomes the law of the land and not just the law of the Tenth Circuit as it is today, those local governmental units will be besieged by powerful interests seeking non-market-based advantages at the expense of their competitors, consumers, and the economy as a whole. And as the judicial barriers to these anticompetitive arrangements are eroded by decisions like the opinion below, local and regional economies will be increasingly dominated by government blessed price-fixing arrangements. Competing gas stations will get together and agree to collectively impose a ten-cent-per-gallon surcharge to offset the costs of maintaining their underground tanks. Restaurants will get together and collectively impose a $1.00 per customer seating charge to offset the costs of complying with local health regulations. Landlords will get together and agree to collectively impose a $10.00 per month fee to offset the costs of complying with fire and safety codes. The only way to prevent this potent combination of powerful interests from restraining the economic life of the country is the vigorous enforcement of the antitrust laws.

Coming more than five years after this Court's last state action decision in *Ticor*, this case presents the Court with a timely opportunity to reaffirm the importance of both the active supervision and clear articulation prongs of the state action doctrine, as well as to correct the Tenth Circuit's wayward decision below.

For the reasons set forth above, petitioner David C. Zimomra respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

GERALD BADER
Counsel of Record
STEVEN M. FEDER
BADER, VILLANUEVA & FEDER
1660 Wynkoop Street
Suite 1100
Denver, Colorado 80202
(303) 534-1700

DAVID BOIES
BOIES & McINNIS
5408 Port Royal Road
Springfield, Virginia 22151
(703) 764-8700

Attorneys for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED APRIL 22, 1997

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 96-1120
No. 96-1203

DAVID CHARLES ZIMOMRA, on behalf of himself and all others similarly situated.

Plaintiff-Appellant,

v.

ALAMO RENT-A-CAR, INC.; AVIS, INC.; BUDGET RENT A CAR CORPORATION; DOLLAR RENT-A-CAR SYSTEMS, INC.; HERTZ CORPORATION; NATIONAL CAR RENTAL SYSTEM, INC.; THRIFTY RENT-A-CAR SYSTEMS, INC.; VALUE RENT-A-CAR, INC.; ENTERPRISE LEASING CO. OF DENVER; NATIONAL CAR RENTAL, named as National Car Rental, Inc.; RESORT RENT-A-CAR, INC.; STEAMBOAT SPRINGS RENTAL AND LEASING, INC.; TRYND, INC.; TIARA ENTERPRISES, INC.,

Defendants-Appellees.

Appeal from United States District Court
for the District of Colorado
(D.C. No. 94-S-2148)

David Boies, of Boies & McInnis, Fairfax, Virginia (Steven M.

Feder, of Bader, Villanueva & Feder, Denver, Colorado, with him on the brief), for the appellant.

Terrence C. Gill (Stanley L. Garnett and Stephen D. Gurr with him on the brief), of Brownstein Hyatt Farber & Strickland, P.C., Denver, Colorado, for the appellees.

Before SEYMOUR, Chief Judge, HENRY and BRISCOE, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiff David C. Zimomra appeals the district court's dismissal of his consolidated class action complaints alleging federal antitrust claims, as well as various state law claims, against fourteen car rental companies operating at Stapleton International Airport (Stapleton) and Denver International Airport (DIA). We affirm.

I.

On November 8, 1993, the City and County of Denver enacted Denver Bond Ordinance No. 863 to help fund construction of car rental facilities at DIA. Pursuant to the ordinance, the City and County issued special facilities revenue bonds in the amount of $65,579,000 to fund construction. To ensure repayment of the bonds (repayment period runs from 1993 through 2000), Ordinance 863 requires all car rental companies awarded rights to operate at DIA, all of whom entered into special facilities and ground leases for their respective facilities, to charge and collect "usage fees" from their customers. Specifically, Section 3.4(a) of the ordinance provides that

> a Usage fee shall be charged and collected by each Company from the person entering into each motor vehicle rental agreement with the Company at Stapleton International Airport [predecessor to DIA] prior to the opening date of Denver International Airport for commercial business as established by the City, and after such opening date.

Appellant's append. at 81.

The daily usage fee was initially set at $2.98 and was to remain at that amount until October 1, 1994. Subsequent daily usage fees are to be established through the interaction of a "Managing Committee," which is composed of a representative from each car rental company and an "Independent Consultant" appointed by the Managing Committee with the approval of the Manager of Public Works of the City and County of Denver or his designee. Section 3.4(b) of the ordinance provides:

> The Usage Fee for each 12-month period commencing October 1, 1994 shall be an amount determined by the Independent Consultant to be sufficient to produce revenues which, together with available Reserve Balances in the respective Company Revenue Accounts in the Car Rental Special Facilities Revenue Fund equal, in the aggregate, to 115% of the sum of the principal of and interest on the Bonds coming due in such 12-month period plus the reasonably expected Administrative Expenses for such 12-month period,

> deficiencies then existing in the Special City Reserve Fund, and payments to the City under [the provisions of Ordinance 863] for such period. In determining the amount of the Usage Fee for any period the Independent Consultant shall evaluate such factors as it shall deem necessary which may include, among other things, the number of transaction days experienced by the Companies for one or more previous years for the rental of motor vehicles subject to the payment of Concession Fees (or comparable information at Stapleton International Airport), the number of transaction days estimated by [the car rental companies] for such period for the rental of motor vehicles subject to the payment of Concession Fees, and an estimate of the number of origination and destination passengers at [DIA] for such period.

Appellant's append. at 82-83.

By July 1 of each year, the Independent Consultant is required to furnish a report to the City and County of Denver, the car rental companies, and the banks involved in funding the special revenue bonds, setting forth the amount of the proposed daily usage fee for the next 12-month period "which, in the opinion of the Independent Consultant, is necessary to produce the required Usage Fee receipts . . . , together with an explanation of the basis for determining such amount." Appellant's append. at 83 (Section 3.4(c)). Any recipient of the report is then allowed a two-week period in which to comment

upon the proposed daily usage fee and, if there is no objection, the fee becomes effective on October 1 of that year. If there is an objection, the Independent Consultant evaluates the objection and decides whether to recalculate the proposed daily usage fee.

The car rental companies deposit their collected usage fees in a "Car Rental Special Facilities Revenue Fund" on a monthly basis. Appellant's append. at 82 (Section 3.4(a)). In turn, the Car Rental Special Facilities Revenue fund is used to pay the principal and interest on the bonds, as well as associated expenses. Any amounts remaining after the bonds are retired (in the year 2000) will go to the City and County of Denver and will constitute gross revenues of the airport system. Appellant's append. at 78-79, 91 (Sections 3.1 and 3.13).

Plaintiff is a resident of Fairfax, Virginia. On unspecified dates in 1993 and 1994, he allegedly rented cars at Stapleton and was charged a $2.98 daily usage fee in addition to the agreed-upon daily rental rates. On July 11, 1994, plaintiff filed a complaint in the United States District Court for the Eastern District of Virginia purporting to sue on behalf of "all persons in the United States . . . who have rented cars from any defendant at Denver's Stapleton Airport and were charged a $2.98 per day charge during the period from and including 1993 to present." Appellees' supp. append. at 6. Named as defendants in the complaint were eight car rental companies doing business at Stapleton. Plaintiff asserted claims under Section 1 of the Sherman Antitrust Act and Sections 4 and 6 of the Clayton Act, as well as state law claims of fraud and deceit, unjust enrichment, and negligent misrepresentation. He alleged the defendant car rental companies violated federal and state law by jointly agreeing to charge airport customers a uniform $2.98 daily usage fee in addition to their quoted rental prices.

Appendix A

The action was transferred to federal district court in Colorado on September 9, 1994. Plaintiff filed a second complaint in Colorado federal district court on November 9, 1994, naming six additional car rental companies as defendants. The allegations of the second complaint were substantially similar to those in the first complaint.

Defendants moved to dismiss both complaints. Although defendants acknowledged imposing a $2.98 daily usage fee on airport customers, the contended they were required to do so by Ordinance 863. Accordingly, defendants sought dismissal of plaintiff's antitrust claims on state action immunity grounds. After consolidating both actions, the district court issued an order on February 23, 1996, granting the pending dispositive motions and dismissing plaintiff's claims against all but one of the named defendants (Tiara Enterprises, Inc.). In so doing, the district court concluded plaintiff's antitrust claims against defendants were barred by the state action immunity doctrine. Having concluded defendants were immune from plaintiff's antitrust claims, the court declined to exercise supplemental jurisdiction over plaintiff's supplemental state law claims. On April 12, 1996, the remaining defendant, Tiara Enterprises, Inc., filed a motion to dismiss and the court granted the motion on April 17, 1996 for the same reasons as in its February 23, 1996 order.

II.

State action immunity

Plaintiff contends the district court erred in concluding defendants were immune from federal antitrust claims under the state action immunity doctrine. In particular, he contends

Ordinance 863, upon which defendants and the court relied, was not enacted pursuant to a clearly articulated and affirmatively expressed state directive to displace price competition in the car rental market. Further, he contends even if the ordinance was enacted pursuant to such a state policy, defendants' conduct is not immune from antitrust laws because the City and County of Denver does not actively supervise the setting or modification of the daily usage fee.

The "state action immunity" doctrine originated in *Parker v. Brown*, 317 U.S. 341 (1943), and " 'exempts qualifying state and local government regulation from federal antitrust, even if the regulation at issue compels an otherwise clear violation of the federal antitrust laws.' " *Cost Management Services v. Washington Natural Gas Co.*, 99 F.3d 937, 941 (9th Cir. 1996) (quoting Hovenkamp, *Federal Antitrust Policy; The Law of Competition and its Practice* § 20.2, at 673 (West 1994)). Although the doctrine was aimed at protecting state legislatures and state supreme courts acting in their legislative capacities, it can provide protection to other individuals or entities acting pursuant to state authorization. *See Hoover v. Ronwin*, 466 U.S. 558, 568 (1984). In such situations, however, "closer analysis is required" to determine whether antitrust immunity is appropriate. *Id.; Porter Testing Laboratory v. Board of Regents*, 993 F.2d 768, 770 (10th Cir.), *cert. denied*, 510 U.S. 932 (1993).

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980), the Supreme Court established a two-part test to determine whether alleged anticompetitive conduct on the part of a private party is immunized under the state action immunity doctrine. First, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.' " *Id.* at 105 (quoting *City of Lafayette v. Louisiana*

Power & Light Co., 435 U.S. 389, 410 (1978)). Second, "the policy must be 'actively supervised' by the State itself." *Id.* Application of this "rigorous" test ensures that *Parker* immunity is applied only where the "private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985), the Supreme Court modified the *Midcal* test for cases involving municipalities, specifically holding municipalities need not satisfy the *Midcal* active state supervision requirement because "there is little or no danger that [a municipality] is involved in a private price-fixing arrangement." *Id.* The result is that a municipality can obtain exemption under the state action immunity doctrine by satisfying only the first prong of the *Midcal* test, i.e., by demonstrating it acted pursuant to "clearly articulated and affirmatively expressed" state policy. *Id.*

Here, the district court applied the two-part *Midcal* test and concluded the defendant car rental companies were entitled to state action immunity from plaintiff's federal antitrust claims. In reviewing the district court's decision, we apply a de novo standard. *See F.T.C. v. Hospital Bd. of Directors of Lee County*, 38 F.3d 1184, 1187 (11th Cir. 1994) (application of state action immunity doctrine is a question of law reviewed de novo); *Buckley Const. v. Shawnee Civic & Cultural Development Authority*, 933 F.2d 853, 855 (10th Cir. 1991).

Which test to apply

Our initial inquiry is whether this case should be analyzed under the two-prong *Midcal* test, which typically applies to private actors, or the single-prong *Town of Hallie* test, which

applies to municipalities. Although the district court applied the *Midcal* test without discussing the municipality/private actor issue, defendants argue on appeal that the *Town of Hallie* test is appropriate because the challenged usage fee is the result of action on the part of a municipality, i.e., the City and County of Denver. More specifically, defendants argue "the anticompetitive conduct, if any, occurred when [the City and County of] Denver set the amount of the Usage Fee in the Bond Ordinance and required its collection from each car rental customer, not by way of the private car rental companies' compliance with the law." Appellees' br. at 26. Further, defendants contend the *Town of Hallie* test is appropriate because Ordinance 863 "does not permit any discretion on the part of the car rental companies in assessing or determining the amount of the Usage Fee." *Id.*

We agree with defendants that state action immunity in this case is properly determined according to the *Town of Hallie* test. In *Patrick,* the Supreme Court noted the active supervision prong of the *Midcal* test "requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." 486 U.S. at 101. Such active state review is clearly necessary where private defendants are empowered with some type of discretionary authority in connection with the anticompetitive acts (e.g., to determine price or rate structures). Here, however, the named defendants have no such discretionary authority. Rather, the provisions of Ordinance 863 make clear that the City and County of Denver is the "effective decision maker" with respect to both the amount of the daily usage fee and imposition of the fee. *City Communications v. City of Detroit,* 660 F.Supp. 932, 934-35 (E.D.Mich. 1987), *aff'd,* 888 F.2d 1081 (6th Cir. 1989). Although plaintiff claims defendants have input into the amount of the daily usage fee in 1994-2000, the provisions of

the ordinance make it clear that ultimate control over the amount of the fee rests with the City and County of Denver. Specifically, the amount of the fee for those years must equal "115% of the sum of the principal of and interest on the Bonds coming due in such 12-month period plus the reasonably expected Administrative Expenses for such 12-month period, deficiencies then existing in the Special City Reserve Fund, and payments to the City under the [provisions of Ordinance 863]." Appellant's append. at 82. In our view, application of the active supervision prong is of little value under these circumstances because the challenged conduct is mandated and strictly controlled by the City and County of Denver via Ordinance 863. Stated differently, we see no need for the state to supervise defendants' conduct (and no need for the second prong of the *Midcal* test) because there is little, if any, risk of defendants doing anything other than complying with the City and County's mandate.

We further note that plaintiff could have named the City and County of Denver as a defendant (or even the sole defendant) in this action. Had he done so, it is clear we would have applied the single-pronged *Town of Hallie* test rather than the double-pronged *Midcal* test to determine whether the City and County of Denver was entitled to state action immunity. *See Allright Colorado v. City and County of Denver,* 937 F.2d 1502 (10th Cir.) (City and County of Denver named as defendant; court applied *Town of Hallie* test to determine immunity), *cert. denied,* 502 U.S. 983 (1991). We therefore find it inconsistent, when the same conduct is at issue (i.e., imposition of the daily usage fee), to apply one test to the City and County of Denver (the *Town of Hallie* test), and apply a different, more stringent test (the *Midcal* test), to the private defendants. Were we to apply different tests, the result could be that the City and County of Denver would be entitled to immunity but the private defendants

would not. More specifically, the City and County of Denver, the entity that enacted the ordinance and imposed the daily usage fee, could be immune from antitrust damages, while the car rental companies, all of whom were compelled to comply with the ordinance in order to lease space at DIA, could be liable to plaintiff for antitrust damages. Such a result would be illogical and inconsistent with Supreme Court precedent.

In *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 58-59 (1985), the Supreme Court specifically emphasized that "[t]he success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant." The implication of this holding, we believe, is that in cases such as the one at bar, where private parties are acting under the compulsion of a municipality or other political subdivision, the same test should apply to determine state action immunity regardless of who the named defendants are.

In somewhat similar circumstances, several circuit and district courts have held that once a municipality (or other governmental unit) is determined to be immune from antitrust liability, the immunity should be extended to include private parties acting under the direction of the municipality. *Cine 42nd Street Theater Corp. v. Nederlander Organization*, 790 F.2d 1032, 1048 (2d Cir. 1986) (holding private party theater operators acting in concert with urban development corporation which acquired and leased theaters for urban redevelopment project enjoyed corporation's state action immunity from antitrust liability; court did not conduct separate state action analysis for private parties); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii*, 810 F.2d 869, 878 (9th Cir. 1987) (association of individual taxi owner-operators could not be held liable under

Sherman Act for possessing exclusive franchise to provide taxi service from Oahu airport where state department of transportation had been granted state action immunity to grant franchise); *City Communications,* 660 F.Supp. at 935 ("once it is determined that the municipality is entitled to immunity from the antitrust laws, the private parties who are regulated by the municipality are also entitled to immunity as long as the 'effective decision maker' is the municipality rather than the private parties"). "Recognizing that the state action doctrine protects state action, not state actors, these courts reason that to allow suits against private parties for actions immunized as to municipalities would allow plaintiffs to circumvent the state action doctrine and challenge protected municipal decisions through artful pleading." *Bloom v. Hennepin County,* 783 F.Supp. 418, 427 (D.Minn. 1992) (extending state action immunity from state governmental unit to private party). Admittedly, there is a difference between the above-cited cases and the instant case in that the City and County of Denver has not been named as a defendant in this case. Nevertheless, we conclude plaintiff's "artful pleading" should not control which test we apply in determining antitrust immunity for the challenged conduct.

*Applying the **Town of Hallie** test*

In analyzing whether the State of Colorado articulated a clear and affirmative policy to allow the conduct at issue here, the district court looked to Articles 3 and 4 of Title 41 of the Colorado Revised Statutes, and to the County and Municipality Development Revenue Bond Act, C.R.S. § 29-3-101 et seq. We proceed to review these same statutes.

Article 3 of Title 41 of the Colorado Revised Statutes is known as the "Public Airport Authority Act" and provides cities, towns, and counties in Colorado with the right to create "airport

authorities" for the "purpose of acquiring and improving airports. . . . and related facilities." C.R.S. § 41-3-102 (1996). The Act further provides airport authorities in Colorado with the power to "borrow money and . . . issue bonds payable in whole or in part from the income of the authority and otherwise secured to the extent permitted by law." C.R.S. § 41-3-106(e)(1996).

Article 4 of Title 41 of the Colorado Revised Statutes (which has no short title) governs airports in the State of Colorado. C.R.S. § 41-4-101 (1996) provides:

> The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities; and the exercise of any other powers granted in this part 1 [of the Act] to any county, city and county, city, or town are . . . public governmental functions, exercised for a public purpose, and matters of public necessity.

C.R.S. § 41-4-106 (1996) provides that counties in Colorado have the "power and jurisdiction," in connection with the erection, maintenance, and operation of any airport.

> to regulate the receipt, deposit, and removal and the embarkation of passengers or property to or from such airports; to exact

> and require charges, fees, and tolls, together with a lien to enforce their payment; to lease or assign for operation such space or area, appurtenances, appliances, or other conveniences necessary or useful in connection therewith; . . . to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport.

C.R.S. § 41-4-112 (1996) authorizes any county in Colorado

> to rent or lease . . . any lands or interest in lands acquired by the county for the purposes set forth in this part 1 to any person, partnership, association, or corporation, either public or private, for commercial, industrial, or other purposes, for such periods of years and upon such terms and conditions as are deemed in the best interests of the county by the board of county commissioners.

The second general statute cited by the district court was the County and Municipality Development Revenue Bond Act (Bond Act), C.R.S. § 29-3-101 et seq. C.R.S. § 29-3-102(1) (1996) provides it was the intent of the Colorado General Assembly "to authorize counties and municipalities to finance, acquire, own, lease, improve, and dispose of properties to the end that such counties and municipalities may be able to promote industry and develop trade or other economic activity." Similarly, C.R.S. § 29-3-102(3) provides it was the intent of the General

Assembly to vest Colorado counties and municipalities "with all powers that may be necessary to enable them to accomplish such purposes, which powers shall in all respects be exercised for the benefit of the inhabitants of this state for the promotion of their health, safety, welfare, convenience, and prosperity." Finally, C.R.S. § 29-3-104(1)(a), (b), (c) (1996) specifically grants Colorado counties and municipalities with a variety of general powers, including the power to "improve and equip." to "finance" projects, to "enter into financing agreements with others for the purpose of providing revenues to pay the bonds authorized by" the Bond Act, and to "issue revenue bonds for the purpose of defraying the cost of financing, refinancing, acquiring, improving, and equipping any project, including the payment of principal and interest on such bonds."

In *Allright,* we found state action immunity in an identical section of Title 41, C.R.S. § 41-4-106, 937 F.2d at 1506-11. The plaintiffs in *Allright,* operators of off-airport shuttle bus parking services, filed suit against the City and County of Denver contending regulations governing shuttle bus services at Stapleton violated federal antitrust laws. The district court dismissed plaintiffs' claims, concluding defendants were entitled to state action immunity. On appeal, we affirmed the district court's decision. In so doing, we cited C.R.S. §§ 41-4-101, 41-4-106, and 41-4-205, and specifically noted that 41-4-106 "confer[red] upon counties a broad authority to regulate airport activities, including the power 'to regulate the receipt, deposit, and removal and the embarkation of passengers or property to or from such airports; to exact and require charges, fees, and tolls . . . ; to lease or assign for operation such space or area . . . necessary or useful in connection therewith; . . . to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within

or over said airport.' " 937 F.2d at 1508. We concluded the City and County of Denver, in regulating shuttle bus services at the airport, had done precisely what was allowed by 41-4-106. Moreover, we concluded displacement of competition in the provision of shuttle bus services was a foreseeable result of the City and County of Denver's broad authority to regulate.

Here, citing the above-quoted statutes and relying heavily upon *Allright,* the district court held:

> Not only do state statutes specifically authorize cities and municipalities to take authority over airports, but they also allow for the issuance of bonds to finance and improve airports. The statute also gives the authority to establish a means to ensure repayment of those bonds. The City and County of Denver enacted the Denver Bond Ordinance pursuant to state authority, therefore the first part of the state action immunity test is met.
>
> Plaintiff argues that the Colorado Airport Act does not specifically refer to car rental activities. While this is true, the Court notes that the Colorado Airport Act does not specifically refer to shuttle bus services either. Nevertheless, the Tenth Circuit found that the Colorado Airport Act provided the necessary authority to displace competition. The case at hand involves "related activities" as referred to in *Allright Colorado.* The City and County of Denver clearly had the

> authority to issue bonds to finance new car rental facilities at DIA. Once the City and County of Denver issued bonds to finance the DIA facilities, it was within the best interest of the inhabitants of the State of Colorado and the City and County of Denver that those bonds be repaid. Therefore, under the authority of the Colorado Airport Act and the County and Municipality Development Revenue Bond Act, it is reasonably foreseeable that the City and County of Denver would enact anticompetitive legislation for the purpose of ensuring the principal and interest of the airport bonds be paid.

Appellant's append. at 31-32 (internal citations omitted). We agree. The above-cited statutes gave the City and County of Denver authority to construct car rental facilities at DIA, to issue bonds to cover the costs of construction, and to lease facilities to defendants. Further, although Ordinance 863 specifically refers only to the Bond Act, it is clear the City and County of Denver had authority, pursuant to C.R.S. § 41-4-106, to require defendants to impose the daily usage fee on their car rental customers. As we noted in *Allright,* 41-4-106 gives the City and County of Denver authority "to regulate the receipt, deposit, and removal and the embarkation of passengers . . . to or from" both Stapleton and DIA, "to exact and require charges, fees, and tolls," and "to provide rules and regulations governing the use of such airport and facilities . . . and means of transportation within or over said airport." As in *Allright,* this is precisely what the City and County of Denver did when it enacted the daily usage fee. Further, as in *Allright,* it is reasonably foreseeable

that implementation of such authority could displace competition in the area of car rental services.

Because the *Town of Hallie* test has been satisfied we conclude defendants are entitled to state action immunity from plaintiff's antitrust claims.

Noerr-Pennington doctrine

Defendants argue the *Noerr-Pennington* doctrine also provides them with immunity from plaintiff's antitrust claims. The *Noerr-Pennington* doctrine is based upon the protections of the First Amendment and exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition. *United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight,* 365 U.S. 127 (1961); *Oberndorf v. City and County of Denver,* 900 F.2d 1434, 1439-40 (10th Cir.), *cert. denied,* 498 U.S. 845 (1990). "Immunity under the *Noerr-Pennington* doctrine is designed to protect the right to petition and engage in political activity." *Oberndorf,* 900 F.2d at 1440. In particular, the doctrine "protects rights of association and petition, which would be denied if groups with common interests could not, without violating the antitrust laws, use the channels and procedures of government agencies to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors." *Id.* (citing *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510-11 (1972)); *see Professional Real Estate Investors v. Columbia Pictures Industries,* 508 U.S. 49, 56 (1993) (doctrine encompasses private actions that "attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly").

Although the district court did not address this argument, we conclude the *Noerr-Pennington* doctrine exempts defendants from antitrust liability to the extent plaintiff is challenging their efforts to convince the City and County of Denver to enact Ordinance 863 and impose the daily usage fee requirement.[1]

Findings of fact contrary to allegations in plaintiff's complaints?

Plaintiff contends the district court erred by making findings of fact which were contrary to the allegations in his two complaints, and without permitting any discovery or holding an evidentiary hearing. According to plaintiff, the court was obligated to take all facts pled in the complaints as true, as well as all inferences that could be reasonably drawn therefrom. Plaintiff also argues the court erred in concluding, based solely upon the provisions of Ordinance 863, that the City and County of Denver actively supervises the daily usage fee. More specifically, plaintiff argues that, in deciding whether the second prong of the *Midcal* test is satisfied, the court's inquiry "is incomplete if it does not include a close examination of what the municipality *actually did* in furtherance of its duty to actively supervise." Appellant's br. at 30 (underlining in original).

We conclude it was entirely appropriate for the district court to take judicial notice of the provisions of Ordinance 863.

---

1. Neither the original complaint nor the amended complaint specifically identified whether plaintiff was challenging defendants' successful efforts at lobbying the City and Count of Denver to pass Ordinance 863. However, because the amended complaint alleges defendants "sought, and ultimately obtained, a city ordinance purporting to 'compel' them to charge" the daily usage fee, appellant's append. at 6, we will assume for purposes of this appeal that plaintiff is challenging defendants' lobbying activities.

Appendix A

Federal Rule of Evidence 201 authorizes a federal court to take judicial notice of adjudicative facts at any stage of the proceedings, and in the absence of a request of a party. *See Clemmons v. Bohannon*, 918 F.2d 858, 865 n. 5 (1990), *vacated on other grounds*, 956 F.2d 1523 (1992); *Melton v. City of Oklahoma City*, 879 F.2d 706, 724 (10th Cir. 1989), *modified on other grounds*, 928 F.2d 920 (10th Cir.) (en banc), *cert. denied*, 502 U.S. 906 (1991). This includes taking notice of provisions in municipal ordinances. *Clemmons*, 918 F.2d at 865 n. 5; *see Melton*, 879 F.2d at 724 (taking notice of Oklahoma City Charter). Where, as here, a party requests a court to take judicial notice of adjudicative facts and supplies the court with the necessary information, Rule 201(d) requires the court to comply with the request. Thus, the district court, having been presented with Ordinance 863 by defendants, was required to take judicial notice of its provisions. To the extent that plaintiff's allegations conflicted with the provisions of the ordinance, plaintiff's allegations were appropriately rejected or ignored. *See* Fed. R. Evid. 201. Although plaintiff is entitled "to an opportunity to be heard as to the propriety of taking notice and the tenor of the matter noticed." Fed. R. Evid. 201(e), the instant appeal has certainly given him that opportunity. Notably, there is nothing in his brief that effectively controverts or calls into question any of the provisions of Ordinance 863.

Because we have concluded the *Town of Hallie* test, rather than the *Midcal* test, is applicable here, we find it unnecessary to address plaintiff's argument that the provisions of Ordinance 863, considered alone, are insufficient to satisfy the active state supervision prong of the *Midcal* test.

The judgment of the district court is AFFIRMED.

Appendix A

J. Henry, concurring.

I concur in the majority decision, writing separately only to briefly note that though statute and precedent compel the above result, several scholars and judges, and perhaps even the ghost of Adam Smith, seem to warn that the policy behind our laws may need to be re-examined by appropriate local, state, and national legislative bodies.

Recent studies by Law and Economics scholars have questioned the wisdom of interfering with the marketplace under the state action exemption, set forth in *Parker v. Brown*, 317 U.S. 341, 350-52 (1943), from national antitrust law. *See generally* William H. Page, *Interest Groups, Antitrust, & State Regulation; Parker v. Brown in the Economic Theory of Legislation*, 1987 Duke L.J. 618, 625 (1987) (noting that "state economic regulation is frequently in sharp conflict with [economic efficiency], largely because of the problem of rent seeking by interest groups"); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 723 (1986). *But cf.* Merrick B. Garland, *Antitrust & State Action; Economic Efficiency & the Political Process*, 96 Yale L.J. 486, 519 (1987) (critiquing approaches of Law and Economics scholars). Though the state action exemption may be "grounded in principles of federalism," a bedrock principle of our political system, it is certainly also true that "[t]he preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom." *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992).

Where the principles of federalism and the free market collide, great caution is warranted in the balance we strike. As Justice Kennedy observed for the majority in *Ticor:*

> Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the [*California Retail Liquor Dealers Ass'n v.*]*Midcal* [*Aluminum,* 445 U.S. 97 (1980),] test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Id. at 636. Indeed, in *Ticor,* 36 states filed *amici curiae* briefs urging that broad application of the doctrine would not serve the states best interests. *Id.* at 635.

Certainly the market has been tinkered with before in order to provide such vital public services as airports. But one wonders why the car-renting consumer should have to pay for the facilities of those less efficient car rental companies who cannot compete with companies that can rent both facilities and automobiles competitively. Indeed, the small-desk car rental companies might as well have a desk as big as the companies that are trying harder since the hapless tourist is going to have to pay for it anyway. The litigation-spawning capabilities of state-sanctioned, anticompetitive bargains have been prophesied and questioned. *See* Frank E. Easterbrook, *Foreword: The Court & the Economic System,* 98 Harv. L. Rev. 4, 18 (1984) ("[A]nticompetitive bargains embedded in state legislation will become targets for challenge under the antitrust laws; the deference due toward a

statute that corrects 'market failures' is not due toward a statute that creates them.").

As the majority opinion makes clear, the state action immunity doctrine once suggested two safeguards before allowing disruption of the market. First, a city or state must have clearly articulated and affirmatively expressed the state policy to supplant competition in this area. *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978); *Parker*, 317 U.S. at 350-52. With respect to this requirement, where private individuals or municipalities acted pursuant to state authorization, "[c]loser analysis [wa]s required." *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984); *Porter Testing Lab. v. Board of Regents*, 993 F.2d 768, 770 (10th Cir. 1993). (Here, a not so close analysis reveals that the city's criterion seems to have included a clearly articulated agreement on the part of the rental companies to hold the city harmless in the event of a finding of anticompetitive activity. Aplt's Reply Br. at 1-2.) Second, the policy had to be "actively supervised" by the state itself. *Midcal*, 445 U.S. at 105.

This *Midcal* test remains the test for actions taken by states, but in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Court noted:

> In *Midcal*, we stated that the active state supervision requirement was necessary to prevent a State from circumventing the Sherman Act's proscriptions "by casting . . . a gauzy cloak of state involvement over what is essentially a private price fixing arrangement." 445 U.S., at 106 [sic]. Where a private party is engaging in the

> anticompetitive activity, there is a real danger that he is acting to further his own interest, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Id. at 46-47 (emphasis in original).

Given that *Hallie* does away with the active supervision prong for municipalities, we are left with an interference with competition based on the lobbying ability of those few who benefit from it. *See* John Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 Tex. L. Rev. 481, 488 (1982) ("The 'clearly articulated and affirmatively expressed' criterion involves the Court in the morass of legislative intent and makes the applicability of federal antitrust turn on whether the statute's proponents had the 'skill [or] influence to generate proper legislative history.' ") (quoting *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 610 (1976) (Blackmun, J., concurring)); *see also Fisher v. City of Berkeley*, 475 U.S. 260, 269 (1986) ("There may be cases in which what

appears to be a state- or municipality-administered price stabilization scheme is really a private price-fixing conspiracy, concealed under a 'gauzy cloak of state involvement.' This might occur even where prices are ostensibly under the absolute control of government officials.") (quoting *Midcal*, 445 U.S. at 106).

Professor Wiley suggests the state action doctrine be replaced with a doctrine that examines whether the market has been "captured" by a few players to the detriment of competition, 99 Harv. L. Rev. at 743. Though, like Justice Scalia, "I am skeptical about [ ] *Parker v. Brown*." *Ticor*, 504 U.S. at 640 (Scalia, J., concurring), I believe that rending the veil of the gauzy cloak may not require the adoption of Professor Wiley's intriguing model. Rather, we could insist that *Midcal's* "clear articulation" be very clear, and that even in the case of municipalities, that there be active supervision (hopefully a bit more active than we have here), and that finally, we could require, *a la Hoover*, close analysis where private individuals are acting under state action immunity.

Noting our country's well-placed fealty to the free market, the persuasive criticism of noted scholars and judges, and even statements like that in *Ticor* that "state-action immunity is disfavored, much as are repeals by implication," 504 U.S. at 636, this doctrine has an amazing staying power. I am staying with it today because it is the law. As Judge Easterbrook observed, "Judges must be honest agents of the political branches. They carry out decisions they do not make." 98 Harv. L. Rev. at 60. The ultimate resolution of this issue is properly left to either the Supreme Court, which could overrule *Hallie* and return to a test of greater scrutiny, or to the States and localities, which could reject these blandishments in honor of the invisible hand, or to Congress, which could fine-tune the

Sherman Act. The obligation of this panel is to resolve the dispute before it, which the majority opinion correctly accomplished. But judges also have the opportunity if not the obligation to call attention to anomalous results. This seems to be one.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED FEBRUARY 23, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 94-S-2148

DAVID CHARLES ZIMOMRA, on Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

ALAMO RENT-A-CAR, INC., AVIS, INC., BUDGET RENT A CAR CORPORATION, DOLLAR RENT-A-CAR SYSTEMS, INC., THE HERTZ CORPORATION, NATIONAL CAR RENTAL SYSTEM, INC., THRIFTY RENT-A-CAR SYSTEM, INC., VALUE RENT-A-CAR, INC.; ENTERPRISE LEASING CO. OF DENVER; NATIONAL CAR RENTAL, INC.; RESORT RENT-A-CAR, INC.; STEAMBOAT SPRINGS RENTAL AND LEASING, INC.; TIARA ENTERPRISES, INC. and TRYND, INC.,

Defendants.

ORDER

THIS MATTER comes before the Court on Defendants Alamo Rent-A-Car, Inc., Avis, Inc., Budget Rent A Car Corp., Dollar Rent-A-Car Systems, Inc., The Hertz Corp., National Car Rental System, Inc., Thrifty Rent-A-Car System, Inc. and Value

Appendix B

Rent-A-Car, Inc.'s Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6), filed August 19, 1994; Defendant National Car Rental, Inc.'s Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6), filed December 22, 1994; Defendant Resort Rent-A-Car, Inc.'s Motion to Dismiss Pursuant to 12(b)(6), F.R.C.P., filed December 29, 1994; Defendant Enterprises Leasing Co. of Denver's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12 (b)(6), filed January 3, 1995; Defendant Steamboat Springs Rental and Leasing Inc.'s Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6), filed January 6, 1995; Defendant Trynd Inc.'s Motion to Dismiss Pursuant to Federal Rules of Civil Procedure Rules 12(b)(6) and 9(b), filed January 23, 1995; and Plaintiff's Motion for Leave to File Supplemental Memorandum in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss, filed November 15, 1995. The Court has reviewed the Memorandum in Support of Defendants' Motion to Dismiss, Defendant National Car Rental, Inc.'s motion, Plaintiff's Memorandum in Opposition, and Defendants' Reply as well as Plaintiff's Motion for Leave to File Supplemental Memorandum and Defendants' Responses in Opposition.

The issue in this case involves whether either state action immunity or the Local Government Antitrust Act of 1984 shields car rental companies that operated out of Stapleton International Airport (SIA) and who currently operate out of Denver International Airport (DIA) from liability under the Sherman Antitrust Act for charging and collecting a uniform fee from consumers entering into car rental contracts at those locations.

Plaintiff's contention is that since 1993, Defendants jointly agreed to, and have in fact charged individuals into entering into rental car contracts at SIA and DIA a uniform $2.98 daily

fee in addition to their quoted rental prices. Plaintiff contends any agreement for a uniform fee is in violation of the Sherman Antitrust Act. Defendants admit that they have added a per-day uniform fee of $2.98 to every car rental contract since November 1, 1993. Defendants, however, contend that they are required to charge and collect this fee pursuant to Denver Bond Ordinance No. 863. Plaintiff does not deny the existence of the Bond Ordinance, but asserts that Defendants have sole control over the amount of the fee and in fact are not required to charge and collect any amount; that the ordinance simply asserts the companies pay a fee for each car rental contract entered into with consumers at SIA and DIA.

The Sherman Antitrust Act prohibits combinations and agreements that result in anticompetitive activity. 15 U.S.C. § 1 (1995). However, the general prohibition is not without exception. In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943) [hereinafter *Parker*], the United States Supreme Court recognized Congress' intent to provide antitrust immunity for state directed action by noting that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 371 U.S. at 351. The *Parker* Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51. Private parties may assert state action immunity if their challenged activity is compelled and supervised by the state. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721 (1985) [hereinafter *Southern Motor*].

While municipalities, and private parties compelled to act upon the directive of municipal ordinances, are not

unequivocally allocated the same immunity as are states, when a municipal ordinance is enacted pursuant to a clearly articulated and affirmatively expressed state directive to replace competition with regulation, the *Parker* doctrine shields municipalities and individuals acting upon municipal compulsion from antitrust liability. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713 (1985) [hereinafter *Hallie*].

A private party, acting at the direction of a municipal ordinance, is immune from antitrust liability under state action immunity if that party's actions satisfy two requirements. First the state must have articulated a clear, affirmative policy allowing municipalities to engage in anticompetitive conduct. *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943 (1980) [hereinafter *Midcal*]. Second, the state or municipality must actively supervise the anticompetitive conduct. *Id.* This two part test ensures such anticompetitive activity is pursuant to a deliberate state economic policy and is not solely for the benefit of the private party. *Federal Trade Commission v. Ticor Title Ins. Co.*, 504 U.S. 621, 634-35, 112 S.Ct. 2169, 2177 (1992).

A. Colorado Has Articulated an Affirmative Policy Allowing Anticompetitive Conduct

Defendants assert the collection of usage fees from their customers is required by the Denver Bond Ordinance. In order to ascertain whether the Denver Bond Ordinance is the result of a clearly articulated state policy, the applicable state statutes must be analyzed. The City and County of Denver must have had state authorization to enact ordinances, which accepting Plaintiff's argument, have resulted in anticompetitive conduct. While express authorization of the anticompetitive action is not

required, the conduct must be either a foreseeable result of state policy or it must be "clear that anticompetitive effects logically would result from [the] broad authority to regulate." *Hallie*, 471 U.S. at 42. "As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." *Southern Motor*, 471 U.S. at 65.

The Colorado Airport Act gives the City and County of Denver authority to limit competition within the operation of an airport. Colo. Rev. Stat. (C.R.S.) § 41-4-101 *et seq.* (1993). Specifically, the Colorado legislature authorized cities and counties to gain:

> acquisition of any lands for the purpose of establishing airports or other air navigation facilities; . . . the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports . . . ; and the exercise of any other powers granted in this part 1 to any county, city and county, city . . . are hereby declared to be public government functions . . .

C.R.S. § 41-4-101 (1993).

Additionally, the Colorado legislature specifically granted counties the authority:

> to regulate the receipt, deposit, and removal and the embarkation of passengers or property to or from such airports; to exact and require charges, fees, and tolls, together

> with a lien to enforce their payment; to lease or assign for operation such space or area, appurtenances, appliances, or other conveniences necessary or useful in connection therewith . . .

C.R.S. § 41-4-106 (1993).

Through the Colorado Airport Act, the General Assembly has also granted cities and towns the authorization to create "airport authorities" for the "purpose of acquiring and improving airports, . . . and related facilities." C.R.S. § 41-3-102 (1986). The General Assembly also authorized counties to rent or lease such facilities "upon such terms and conditions as are deemed in the best interests of the county by the board of county commissioners." C.R.S. § 41-4-112 (1986).

The County and Municipality Development Revenue Bond Act specifically allows for the issuance of bonds for special projects. C.R.S. § 29-3-101 *et seq.* (1986 & Supp. 1995). The General Assembly expressly indicated such an intent by stating "[i]t is the intent of the general assembly by the passage of this article to authorize counties and municipalities to finance, . . . [and] improve . . . properties to the end that such counties and municipalities may be able to promote industry." C.R.S. § 29-3-102(1) (1986).

Additionally, the General Assembly specifically indicated that it is the intention of the assembly "to vest such counties and municipalities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall in all respects be exercised for the benefit of the inhabitants of this state for the promotion of their . . . welfare, convenience,

and prosperity." C.R.S. § 29-3-102(3) (1986). The General Assembly authorized counties and municipalities (1) "to improve and equip; and to finance, [and] refinance . . . projects." C.R.S. § 29-3-104(1)(a) (1986); (2) "[t]o enter into financing agreements with others for the purpose of providing revenues to pay the bonds authorized by this article," C.R.S. § 29-3-104(1)(b) (1986); and (3) "[t]o issue revenue bonds for the purpose of defraying the cost of financing, refinancing, acquiring, improving, and equipping any project, including the payment of principal and interest on such bonds." C.R.S. § 29-3-104(1)(c) (1986).

The statute which authorizes the issuance of bonds is the County and Municipality Development Revenue Bond Act. C.R.S. § 29-3-101 *et seq.* (1986 & Supp. 1995). Such bonds are "special limited obligations." C.R.S. § 29-3-105(1) (1986). "[T]he principal of and interest on such bonds shall be payable, subject to the mortgage provisions in this article, solely out of the revenues derived from the financing, refinancing, sale or leasing of the project." *Id.*

Upon such authority, the City and County of Denver passed the Denver Bond Ordinance on November 8, 1993. The ordinance states that the Special Facilities Leases shall require that:

> a Usage Fee shall be *charged and collected* by each [car rental] company from the person entering into each motor vehicle rental agreement with the Company at Stapleton International Airport prior to the opening date of Denver International Airport for commercial business as established by the

> City, and after such opening date .... The amount of the Usage Fee for the period from the date of issuance of the Bonds to October 1, 1994 shall be $2.98 per transaction day and shall be the same in each Special Facilities Lease.

City and County of Denver, Co. Bond Ordinance 863, § 3.4(a) (Nov. 8, 1993) (emphasis added). Additionally, the Ordinance mandates the car rental companies to remit the collected fees to the city's Paying Agent to be applied to the Bond payment. *Id.*

The Tenth Circuit has considered the Colorado Airport Act in *Allright Colorado, Inc. v. City and County of Denver*, 937 F.2d 1502 (10th Cir. 1991) [hereinafter *Allright Colorado*]. In that case, a group of off-site parking operators offering shuttle bus service to their parking lots claimed that the city's preference for city-owned shuttle services disadvantaged them and resulted in anticompetitive conduct. 937 F.2d at 1505. To determine if state action immunity applied, the court analyzed the Colorado Airport Act. The court found that the statutory authority of the Airport Act "clearly and affirmatively express[es] a state policy to displace competition in the operation of airports and related activities . . ." 937 F.2d at 1509.

The court in *Allright Colorado* found the initial authority under the Colorado Airport Act to expressly authorize the anticompetitive conduct because the state authority expressed the intention of cities and municipalities to regulate economic policy regarding airports. 937 F.2d at 1508-09. Not only do state statutes specifically authorize cities and municipalities to take authority over airports, but they also allow for the issuance of bonds to finance and improve airports. C.R.S. § 29-3-101 *et*

seq. (1986 & Supp. 1995). The statute also gives the authority to establish a means to ensure repayment of those bonds. C.R.S. § 29-3-104(1)(d) (1986). The City and County of Denver enacted the Denver Bond Ordinance pursuant to state authority, therefore the first part of the state action immunity test is met.

Plaintiff argues that the Colorado Airport Act does not specifically refer to car rental activities. While this is true, the Court notes that the Colorado Airport Act does not specifically refer to shuttle bus services either. Nevertheless, the Tenth Circuit found that the Colorado Airport Act provided the necessary authority to displace competition. The case at hand involves "related activities" as referred to in *Allright Colorado*. The City and County of Denver clearly had the authority to issue bonds to finance new car rental facilities at DIA. Once the City and County of Denver issued bonds to finance the DIA facilities, it was within the best interest of the inhabitants of the State of Colorado and the City and County of Denver that those bonds be repaid. Therefore, under the authority of the Colorado Airport Act and the County and Municipality Development Revenue Bond Act, it is reasonably foreseeable that the City and County of Denver would enact anticompetitive legislation for the purpose of ensuring the principal and interest of the airport bonds be paid.

B. The City and County of Denver Actively Supervise the Anticompetitive Conduct

The second prong of the state action immunity doctrine requires that the anticompetitive conduct is actively supervised. *Midcal*, 445 U.S. at 105 (1980). This ensures that the conduct continues in the interest of the state and the policy expressly indicated by the state authority.

Appendix B

Plaintiff contends there is inadequate supervision to meet this prong. The Denver Bond Ordinance, however, expressly authorizes the method of fee determination, as well as its collection and application to the Bond payment. First, the amount of the Usage Fee is determined by an Independent Consultant appointed by a Managing Committee with the approval of the Manager. Bond Ordinance 863 § 1.3, p.14 & 3.4(b). While the Managing Committee is comprised of authorized rental car company representatives, the Manger is identified as, first the Manager of Public Works of the City or his designee, and then at a later date, as the Manager of Aviation of the City or his designee. *Id.* § 1.3, p.17. Therefore, the Independent Consultant can not be appointed without the approval of the City. Indeed, the Bond Ordinance specifies a certain company as the original Independent Consultant.

Second, the amount of the usage fee is not within the sole discretion of the Independent Consultant. The Special Facilities and Grounds Lease referred to in the Denver Bond Ordinance expressly sets out a formula to guide the determination of the amount of the fee. (Exhibit B to Memorandum in Support of Defendants' Motion). Specifically, the Special Facilities and Grounds Lease, as well as the Bond Ordinance, mandate that the usage fees shall equal 115 percent of the sum of the principal of and interest on the Bonds maturing within the current twelve month period, along with reasonably projected Administrative Costs. Special Facilities and Grounds Lease, § 6.3(c) and Bond Ordinance 863 § 3.4(b). The City has a set period to comment on the proposed amount of the Usage Fee and retains the ability to object to any proposal the Independent Counsel submits. Bond Ordinance 863 § 3.4(c).

Third, if the amount proposed by the Independent

Consultant does not cover the principal and interest plus costs as directed by the Bond Ordinance, the City can charge and collect any additional amounts from the car rental companies. *Id.* § 3.4(b). Consequently, while Plaintiff argues that the City's supervision is "toothless," it is clear that the City retains ultimate control over the amounts paid by the car rental companies to repay the bonds. Therefore, the City retains control over the amount of the usage fee, requires the usage fee to be charged, provides instructions on how such monies are paid to the City and mandates the steps to be taken if the monies paid to the City are not enough to cover the principal and interest on the bonds.

The City and County of Denver meets the minimal requirements for active supervision of this conduct. The Denver Bond Ordinance specifically requires rental car companies to charge and collect a fee from their customers. Those companies then must pay the City. The City actively engages in the committee that oversees the analysis of the amount of the usage fee required and has the authority to compel any car rental company to pay additional costs if the projections of the Independent Consultant do not meet the Bond expenses.

Conclusion

The acts complained of constitute a method of repaying the bonds which allows the car rental companies to have some input into paying the debt for which they are legally responsible. The arrangement also benefits the City and County of Denver which has an arranged method for the repayment of its bonds. The City and County of Denver devised a state authorized method by which the users of the facilities pay the bond payments through a usage fee. In effect, this activity does not

result in anticompetitive conduct. Plaintiff does not contend that the Defendants raised their quoted rental prices to an amount that is uniform. Instead the Defendants simply added a uniform fee to those differing price quotes. Therefore, the competition remains the same between the car rental companies. Additionally, the monies collected from the added usage fee is not the property of the rental car companies, and therefore does not result in an increase of profit for any car rental company. Specifically those monies, as per the Special Facilities and Ground Leases, "are property in which the [rental car] Company holds only a possessory interest and not an equitable interest." Special Facilities and Grounds Lease, § 6.3(e).

Therefore, the state action immunity doctrine shields the Defendant car rental companies from antitrust liability. To hold otherwise would punish the Defendants for complying with local laws. The key is that these Defendants imposed a fee on the rental transactions pursuant to a legitimate ordinance. In that the Denver Bond Ordinance was passed with the express authority of the State, to the extent that it results in anticompetitive effect, the Defendants are shielded by the *Parker* state action immunity doctrine.

Due to the applicability of the state action immunity doctrine to this case, the Court need not look to the Local Government Antitrust Act to find further immunity for the defendants.

The Court finds that it is not necessary to consider Plaintiff's supplemental documents. The issues in this case rest on the fact that the Defendants acted pursuant to a current municipal ordinance. A plain reading of the Denver Bond Ordinance shows Defendants' actions are required by the City and County of Denver. In addition, the date of the documents submitted makes them irrelevant to the issues in this case.

Appendix B

Jurisdiction over Plaintiff's remaining claims is conferred by 28 U.S.C. § 1367 which is a codification of the doctrine of supplemental jurisdiction. Supplemental jurisdiction is a statutory invention which supplanted the notions of pendent and ancillary jurisdiction, and was codified as part of the Judicial Improvements Act of 1990. Section 1367 gives jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). That statute also states that "[a] district court may decline to exercise supplemental jurisdiction over a claim in subsection (a) if the district court has dismissed all claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c)(3).

Because the only claim over which this Court has original jurisdiction is being dismissed, this Court declines, pursuant to 28 U.S.C. § 1967(c)(3), to exercise supplemental jurisdiction over the remaining state law claims.

It is, therefore, ORDERED that

1. Defendants' Motions to Dismiss are GRANTED. Count I of Plaintiff's complaint is dismissed with prejudice.

2. Plaintiff's second, third and fourth claims for relief are dismissed without prejudice.

3. Plaintiff's Motion For Leave to File Supplemental Memorandum in Support of Plaintiff's Opposition to Defendant's Motions to Dismiss is DENIED.

Finally the Court notes that no appearance has been entered

on behalf of Tiara Enterprises, Inc. The Court also notes that Defendant Tiara has been served. Plaintiff is given until March 4, 1996 to file a motion for default judgment against Tiara Enterprises, Inc. or the Court will dismiss that Defendant for failure to prosecute.

DATED at Denver, Colorado, this 23rd day of February, 1996.

BY THE COURT:

s/ Daniel B. Sparr
Daniel B. Sparr
United States District Judge

APPENDIX C — EXCERPTS OF ORDINANCE 863, SERIES 1993, CITY AND COUNTY OF DENVER, COLORADO

CITY AND COUNTY OF DENVER

STATE OF COLORADO

Certification

I, Arie P. Taylor, *Clerk and Recorder, Ex-Officio Clerk of the City and County of Denver, do hereby certify that the attached is a true and correct copy of Ordinance No.* 863 *Series* 1993

I have hereunto set my hand and affixed the Seal of the City and County of Denver, State of Colorado, this 12th *day of* August *A.D.* 1994

Arie P. Taylor
Clerk and Recorder, Ex-officio
Clerk of the City and County of Denver

s/ Donna Verris
Deputy

* * *

Section 1.3. *Definitions.* Terms defined in the Recitals to this Ordinance shall have the meanings assigned to them in the Recitals, except that if any term is defined in both the Recitals and in this Section 1.3, the definition of such term in this Section 1.3 shall control. For all purposes of this Ordinance, except as otherwise expressly provided or unless the context otherwise requires:

"Administrative Expenses" means (a) any fees charged or

expenses incurred by the City in connection with the Facilities, the Special Facilities Leases, the Concession Agreements, this Ordinance, the issuance and sale of the Bonds, and any event or act with respect to or in furtherance of the transactions contemplated hereby or thereby, including but not limited to (i) fees charged by the City for services performed by the Treasurer or other officers or employees of the City, and his and their designees and agents, with respect to the holding, investment and disbursement of moneys, giving and receiving notices or other information and taking other actions required or permitted to be taken by the City or the Treasurer pursuant to the Special Facilities Leases, the Concession Agreements or this Ordinance, which fees shall not exceed fees charged by the City for the performance of comparable services in similar transactions, (ii) any reasonable fees and expenses incurred by the City (including reasonable fees and expenses of Counsel to the City) in connection with the items referred to in this clause (a); and (iii) any taxes or governmental charges payable by the City in connection with the Facilities, the Bonds or any of the other items referred to in this clause (a); (b) the fees, including an initial or acceptance fee and the annual fee, and the reasonable expenses of the Credit Facility Issuer under the Reimbursement Agreement and each of the Credit Support Banks under the separate Credit Support Agreements between such Credit Support Banks and the respective Companies; (c) the fees, including any initial or acceptance and any annual fee, and the reasonable expenses of the Paying Agent (including reasonable fees and expenses of Counsel to the Paying Agent), the Bond Registrar and the Independent Consultant for ordinary services rendered by them under this Ordinance, and the reasonable fees and expenses of the Paying Agent, the Bond Registrar and the Independent Consultant for extraordinary services rendered by them under this Ordinance; (d) any fees and expenses similar

to those described in clause (c) of this definition for other persons retained by the City, the Managing Committee or a Company to perform services in connection with any of the foregoing; and (e) any reasonable costs incurred by any Registered Owner in connection with any proposed amendment, consent or waiver requested under this Ordinance, the Credit Facility or any document related thereto, including the fees of any special counsel, if and to the extent approved by the Treasurer and the Managing Committee; provided, however, that all fees, expenses or other charges included in Administrative Expenses shall be subject to any agreement, other arrangement or law specifying or limiting the same; and provided further that, subject to any contrary provision or any agreement, other arrangement or law referred to in the preceding proviso, Administrative Expenses do not include any fees or expenses that would not have been charged or incurred but for the negligence or misconduct of the person charging or incurring the same.

* * *

"Company" or "Companies" means the following entities, and any surviving resulting or transferee entity permitted under Section 7.3 of each Special Facilities Lease; in addition, each Company's Share and Percentage of the Bonds shall be as set forth below:

Company	Company's Share of Bonds	Company's Percentage of Bonds
Steamboat Springs Rental and Leasing, Inc. d/b/a Advantage Advantage Rent-A-Car, Inc. ("Advantage")	$ 959,092	1.462499%

Appendix C

Alamo Rent-A-Car, Inc. ("Alamo")	8,247,275	12.576091
Avis Rent-A-Car System, Inc. ("Avis")	10,864,307	16.566747
Budget Rent a Car Systems, Inc. ("Budget")	7,562,004	11.531136
Trynd, Inc. d/b/a Dollar Rent-A-Car ("Dollar")	4,915,160	7.495021
Enterprise Leasing Co. of Denver ("Enterprise")	1,432,458	2.184320
The Hertz Corporation ("Hertz")	18,185,333	27.730421
National Car Rental Inc. ("National")	6,310,313	9.622460
Tiara Enterprises, Inc. d/b/a Payless Car Rental ("Payless")	1,051,358	1.603193
Resort Rent-A-Car, Inc. ("Resort")	1,009,873	1.539934
Thrifty Rent-A-Car System, Inc. ("Thrifty")	1,861,583	2.838688
Value Rent-A-Car, Inc. ("Value")	3,180,244	4.849485

* * *

Appendix C

"Cost" or "Costs" means any cost made or incurred in respect in respect of the Facilities or the Terminal Improvements permitted under the Act or the Charter. Without limiting the generality of the foregoing, such costs may include: (i) amounts payable to contractors and suppliers (including fees for designing the Facilities and the Terminal Building Premises where the designs are provided by the contractor or supplier); (ii) costs of labor, services, materials, supplies and equipment furnished by a Company or by Company personnel (including shipping costs and such Company's standard, reasonable allowances for overhead); (iii) architectural, engineering, legal and other professional fees; and (iv) Administrative Expenses.

"Counsel" means an attorney at law or a firm of attorneys (who may be an employee of or counsel to the City, a Company or the Paying Agent) duly admitted to the practice of law before the highest court of any state of the United States of America.

* * *

"Independent Consultant" means David M. Griffith & Associates or other independent accountant or consultant or accounting or consulting firm appointed from time to time by the Managing Committee with the approval of the Manager, who has a favorable reputation for special skills and knowledge which enable it to perform its duties under this Ordinance.

* * *

"Managing Committee" means a committee by such name composed of one Authorized Company Representative for each of the following Companies: Alamo, Avis, Budget, Dollar, Hertz and Payless; provided that any such Company may be replaced

in accordance with written notice given by at least 66 2/3% of the members of the Managing Committee to the City, the Paying Agent and the Credit Facility Issuer. The Authorized Company Representatives on the Managing Committee and the Chair of such Committee serving from time to time shall be as set forth in written notices filed with the City, the Paying Agent and the Credit Facility Issuer.

* * *

"Usage Fees" means the amounts to be charged pursuant to each motor vehicle rental contract which is subject to the Airport concession and collected by each respective Company under Section 6.3 of the Special Facilities Leases as the same may be in effect from time to time, which Usage Fees are to be credited against Facilities Rentals and Administrative Expenses to the extent set forth in the respective Special Facilities Leases.

* * *

Section 1.15. *Certain Determinations and Findings.* In accordance with the Act, the following determination and findings are hereby made:

(a) The maximum amount necessary in each year to pay the principal of and the interest on the Bonds (based on the interest rate(s) on the Bonds and assuming that interest is paid semiannually and assuming no redemptions, other than mandatory sinking fund redemptions, prior to maturity) is as follows:

Appendix C

Annual Period to and Including December 31	Annual Debt Service Requirement
1994	$11,550,205.21
1995	11,550,556.40
1996	11,551,026.10
1997	11,550,639.00
1998	11,550,915.70
1999	11,550,206.10
2000	11,550,860.10

(b) Other than the establishment and maintenance of a Reserve Balance in the Car Rental Special Facilities Revenue Fund and the deposit to the Special City Reserve Fund, no amounts are required to be paid into any reserve fund in connection with the issuance of the Bonds.

(c) Each Special Facilities Lease requires that a Company maintain, or cause to be maintained, the Facilities leased to it and to carry, or cause to be carried, all proper insurance with respect thereto.

(d) The revenues and other amounts payable under the Special Facilities Leases are sufficient to pay, in addition to all other requirements of the Special Facilities Leases and this Ordinance, all sums referred to in subsections (a), (b) and (c) of this Section 1.15.

(e) The revenues and other amounts payable under the Special Facilities Leases are sufficient to pay, in addition to all other requirements of the Special Facilities Leases and this Ordinance, all taxes or payments in lieu of taxes levied upon the Facilities.

* * *

ARTICLE II
THE BONDS

Section 2.1. *Authorized Amount of Bonds; Deposit of Proceeds.* No Bonds may be issued under the provisions of this Ordinance except in accordance with this Article II. The total principal amount of Bonds issued hereunder shall be $65,579,000, except as provided in Section 2.7 hereof. From the proceeds of the sale of the Bonds, the City shall (a) deposit with the Paying Agent in an Issuance Expense Account such amounts to be paid to such persons as shall be directed by the Treasurer in writing at the time of the issuance of the Bonds, (b) pay to the City the amount of $1,979,587 for certain design and construction expenditures made by the City in respect of certain improvements originally expected to be used by the Companies, (c) deposit to the Capitalized Interest Account in the Car Rental Special Facilities Revenue Fund the amount of $1,461,482.66 or such other amount as shall be directed by the Treasurer, as required by Section 3.1(c) hereof, and (d) deposit the balance into the respective Company Construction Accounts in the Construction Fund as shall be directed by the Treasurer in writing at the time of issuance of the Bonds.

* * *

(ii) *Administrative Expense Account.* On the first day of each month, commencing January 1, 1994, the Paying Agent shall transfer $100,000 from the Car Rental Special Facilities Revenue Fund to such Account and such additional amounts as from time to time may be necessary to pay Administrative Expenses as the same become due; provided, that the amount of such monthly transfer may be increased or decreased as shall be directed by the Managing Committee with the approval of the Treasurer and the Credit Facility Issuer.

* * *

Section 3.4. *Usage Fees.*

(a) Under Section 6.3 of each Special Facilities Lease, commencing on the date of original issuance and delivery of the Bonds, a Usage Fee shall be charged and collected by each Company from the person entering into each motor vehicle rental agreement with the Company at Stapleton International Airport prior to the opening date of Denver International Airport for commercial business as established by the City, and after such opening date, which is subject to the requirements set forth in Section 6.2 of the Concession Agreements with respect to the payment of Concession Fees. The amount of the Usage Fee for the period from the date of issuance of the Bonds to October 1, 1994 shall be $2.98 per transaction day and shall be the same in each Special Facilities Lease. Usage Fees collected by each Company shall be paid monthly to the Paying Agent for deposit in that Company's Revenue Account in the Car Rental Special Facilities Revenue Fund for credit against such Company's obligations to pay Facilities Rentals and Administrative Expenses. In the event that the Usage Fees collected by a

Company and paid to the Paying Agent for any six-month period ending on April 1 or October 1, when added to other moneys available in such Company's Revenue Account, are not sufficient to pay when due the principal of and interest on such Company's Percentage of the Bonds and the portion of the Administrative Expenses corresponding to such Company's Percentage of the Bonds during such six-month period, the Paying Agent shall notify such Company of the expected deficiency at least 15 days before the next Interest Payment Date, and the Company is required to pay, or cause to be paid, an amount equal to such deficiency pursuant to Section 6.1 or 6.5 of its Special Facilities Lease. As required under the Special Facilities Leases, the amount of such deficiency shall be paid not later than five days prior to such Interest Payment Date.

(b) The Usage Fee for each 12-month period commencing October 1, 1994 shall be an amount determined by the Independent Consultant to be sufficient to produce revenues which, together with available Reserve Balances in the respective Company Revenue Accounts in the Car Rental Special Facilities Revenue Fund equal, in the aggregate, to 115% of the sum of the principal of and interest on the Bonds coming due in such 12-month period plus the reasonably expected Administrative Expenses for such 12-month period, deficiencies then existing in the Special City Reserve Fund, and payments to the City under Section 3.1(d) hereof, for such period. In determining the amount of the Usage Fee for any period the Independent Consultant shall evaluate such factors as it shall deem necessary which may include, among other things, the number of transaction days experienced by the Companies for one or more previous years for the rental of motor vehicles subject to the payment of Concession Fees (or comparable information at Stapleton International Airport), the number of transaction days estimated

by the Companies for such period for the rental of motor vehicles subject to the payment of Concession Fees, and an estimate of the number of origination and destination passengers at the Airport for such period.

(c) The Independent Consultant shall consult with the Manager and the Managing Committee and shall furnish to the City, the Companies, the Paying Agent and the Credit Support Banks a report not later than July 1 of each year, commencing July 1, 1994, setting forth the Usage Fee for the immediately succeeding 12-month period beginning October 1 which, in the opinion of the Independent Consultant, is necessary to produce the required Usage Fee receipts (including any deficiencies in the balance in the Administrative Expense Account, in the Special City Reserve Fund, and in the amounts required to be paid to the City under Section 3.1(d) hereof for the 12-month period), together with an explanation of the basis for determining such amount. The City, the Companies and the Credit Support Banks shall have until July 15 of such year to comment upon the proposed amount of the Usage Fee recommended in such report and the assumptions, projections and other criteria evaluated by the Independent Consultant in its determination of such amount. If the City, the Managing Committee and none of the Credit Support Banks object to the amount of the proposed Usage Fee set forth in such report by July 15 of such year, such usage Fee shall be charged and collected by such Company for the immediately succeeding 12-month period commencing on October 1. In the event that the City, the Managing Committee or any Credit Support Bank furnishes to the Independent Consultant and the City, the Paying Agent, the other Companies, and the other Credit Support Banks, as the case may be, a written notice objecting to the amount of the proposed Usage Fee and setting forth the basis for such objection, the Independent

Consultant shall evaluate the objection to the amount of the proposed Usage Fee, including the basis for such objection, and if it deems any adjustments are necessary to the amount of the proposed Usage Fee shall recalculate the amount of the proposed Usage Fee for such 12-month period taking into account, as deemed appropriate by the Independent Consultant, the basis for the objection to the proposed Usage Fee as set forth in such notice and such other information which may be furnished by the City, the Companies, and any Credit Support Bank. The Independent Consultant shall furnish to the City, the Paying Agent, the Companies and the Credit Support Banks a report not later than August 1 of such year setting forth the amount of the recalculated Usage Fee which shall be charged and collected by each Company in accordance with Section 6.3 of its Special Facilities Lease for the immediately succeeding 12-month period commencing on October 1. The Paying Agent shall send a copy of all reports of the Independent Consultant to each Registered Owner requesting same.

Section 3.5. *Creation of the Construction Fund.* There is hereby created and ordered established with the Paying Agent a special fund to be designated "City and County of Denver, Colorado, Taxable Airport Special Facilities Revenue Bonds (Rental Car Projects), Series 1993, Construction Fund" (the "Construction Fund"), for the payment of Costs of the Facilities. A separate account (a "Company Construction Account") shall be established in the Construction Fund for each Company. The Construction Fund shall be maintained and kept by the Paying Agent separate from all other moneys, funds and accounts. After depositing and paying the amounts required under Section 2.1 hereof, the City shall forthwith deposit the balance of the net proceeds of the Bonds in the respective Company Construction Accounts in Construction Fund in accordance with instructions

from the Treasurer. The Construction Fund shall consist of the amounts deposited therein pursuant to this Ordinance and any other amounts any Company may deposit therein. The amounts in the Construction Fund, until applied as hereinafter provided, shall be held for the security of all Bonds outstanding hereunder.

The Paying Agent shall maintain a record of the income on investments and interest earned on deposit of amounts held in each Company Construction Account within the Construction Fund and on proceeds of the Bonds in respect of accrued or capitalized interest held by the Paying Agent as Pledged Revenues. Such income or interest may be expended at any time or from time to time to pay Costs of the Facilities in the same manner as the proceeds of Bonds deposited in the Construction Fund are expended, and for no other purpose.

* * *

Section 5.3. *Alternate Credit Facilities.* The Managing Committee may, at its option, and with the consent of at least 66-2/3% in aggregate principal amount of the Bonds then outstanding, provide for the delivery to the Paying Agent of an Alternate Credit Facility having administrative terms acceptable to the Paying Agent. The Registered Owners may, upon a downgrade of the rating of the Credit Facility Issuer by Moody's or S&P below A or A-2, respectively, at their option (which may be exercised only upon approval by Registered Owners holding at least 66 2/3% in aggregate principal amount of the Bonds then outstanding), provide for the delivery to the Paying Agent of an Alternate Credit Facility having administrative terms acceptable to the Paying Agent.

* * *

Appendix C

ARTICLE VI
INVESTMENT OF MONEYS

Section 6.1. *Investment of Bond Fund, Construction Fund, Special City Reserve Fund and Car Rental Special Facilities Revenue Fund Moneys.* Any moneys held as part of the Car Rental Special Facilities Revenue Fund, the Bond Fund, or the Company Construction Accounts in the Construction Fund shall be invested and reinvested by the Paying Agent, at the written direction (or oral direction confirmed in writing) of the Managing Committee, in accordance with Section 5.7 of the Special Facilities Leases. Investments of moneys held in the Special City Reserve shall be invested and reinvested by the Paying Agent at the written direction of the Treasurer in accordance with Section 3.9. Investments of the Car Rental Special Facilities Revenue Fund and Company Construction Accounts in the Construction Fund shall be made in Investment Securities maturing or subject to redemption by the holder at such time or times when such moneys are reasonably anticipated to be needed for construction and acquisition of the Facilities, but in no event shall such Investment Securities have a maturity of more than 18 months. Investments of the Bond Fund and the Special City Reserve Fund shall be made in Federal Securities with maturities not exceeding six months.

APPENDIX D — EXCERPTS FROM COLORADO REVISED STATUTES §§ 29-3-101, *et seq.* (COUNTY AND MUNICIPALITY DEVELOPMENT REVENUE BONDS)

* * *

29-3-102. Legislative declaration. (1) It is the intent of the general assembly by the passage of this article to authorize counties and municipalities to finance, acquire, own, lease, improve, and dispose of properties to the end that such counties and municipalities may be able to promote industry and develop trade or other economic activity by inducing profit or nonprofit corporations, federal governmental offices, hospitals, and agricultural, manufacturing, industrial, commercial, or business enterprises to locate, expand, or remain in this state, to mitigate the serious threat of extensive unemployment in parts of this state, to secure and maintain a balanced and stable economy in all parts of this state, or to further the use of its agricultural products or natural resources.

(2) It is further intent of the general assembly to authorize counties and municipalities to finance, refinance, acquire, own, lease, improve, and dispose of properties to the end that pollution may be ameliorated and controlled more adequate hospital care may be provided, more adequate residential housing facilities for low- and middle-income families and persons may be provided, more adequate facilities for disposing of sewage and solid waste and furnishing water, energy, and gas may be provided, more adequate facilities for sports events and activities and recreation activities, conventions, and trade shows may be provided, more adequate airports, mass commuting facilities, parking facilities, or storage or training facilities may be provided, and more adequate research, product-testing, and administrative facilities may be provided, all of which promote the public health, welfare, safety, convenience, and prosperity.

(3) It is therefore the intention of the general assembly to

vest such counties and municipalities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall in all respects be exercised for the benefit of the inhabitants of this state for the promotion of their health, safety, welfare, convenience, and prosperity.

(4) It is not intended by this article to authorize any county or municipality to operate any manufacturing, industrial, commercial, or business enterprise, or any research, product-testing, or administrative facilities of such enterprise, nor to prohibit the operation of utility plants, residental housing facilities, hospitals, sewage or solid waste disposal facilities, facilities for the furnishing of water, energy, or gas, sports and recreation facilities, convention or trade show facilities, airports, mass commuting facilities, parking facilities, or storage or training facilities by any county or municipality.

(5) This article shall be liberally construed in conformity with this legislative declaration.

* * *

29-3-103. Definitions. As used in this article unless the context otherwise requires:

(1) "Bonds" or "revenue bonds" means bonds, notes, or other securities evidencing an obligation and issued under this article by a county or municipality.

(2) "County" means any county within this state.

(3) "Finance" or "financing" means the issuing of bonds by a county or municipality and the use of substantially all of

the proceeds therefrom pursuant to a financing agreement with the user to pay (or to reimburse the user or its designee) for the costs of the acquisition or construction of a project, whether these costs are incurred by the county, the municipality, the user, or a designee of the user. Title to or in the project may at all times remain in the user, and, in such case, the bonds of the county or municipality may be secured by mortgage or other lien upon the project or upon any other property of the user, or both, granted by the owner or by a pledge of one or more notes, debentures, bonds, or other secured or unsecured debt obligations of the user, as the governing body deems advisable, but no county or municipality shall be authorized hereby to pledge any of its property or to otherwise secure the payment of any bonds with its property; except that the county or municipality may pledge the property of the project or revenues therefrom.

(4) "Financing agreement" include a lease, sublease, installment purchase agreement, rental agreement, option to purchase, or any other agreement or any combination thereof, entered into in connection with the financing or refinancing of a project pursuant to this article.

(5) "Mortgage" means a deed of trust or any other security device for both real and personal property.

(6) "Municipality" means any city, including without limitation any city or city and county operating under a home rule or special legislative charter, or town within this state.

(7) "Ordinance" means an ordinance of a city, town, or city and county.

Appendix D

(8) "Pollution" means any form of environmental pollution, including but not limited to water pollution, air pollution, pollution caused by solid waste disposal, thermal pollution, radiation contamination, or noise pollution.

(9) "Pollution control facilities" means any land, building, or other improvement and all real or personal property, and any undivided or other interest in any of the foregoing, including without limitation structures, equipment, pipes, pumps, dams, reservoirs, improvements, or other facilities useful for the purpose of reducing, abating, preventing, controlling, or eliminating pollution caused or produced by the operation of any manufacturing, industrial, or commercial enterprise or any utility plant or useful for the purpose of removing or treating any substance in processed material, which material would cause pollution if used without such removal or treatment.

(10) "Project" means any land, building, or other improvement and all real or personal properties, and any undivided or other interest in any of the foregoing, except inventories, raw materials, and other working capital, whether or not in existence, suitable or used for or in connection with any of the following:

(a) Manufacturing, industrial, commercial, agricultural, or business enterprises (including, without limitation, enterprises engaged in storing, warehousing, distributing, selling, or transporting any products of agriculture, industry, commerce, manufacturing, or business), or any utility plant;

(b) Hospital, health-care, or nursing-home facilities (including, without limitation, clinics and out-patient facilities and facilities for the training of hospital, health-care, or nursing-home personnel);

(c) Pollution control facilities;

(d) Residential facilities for low- and middle-income families or persons intended for use as the sole place of residence by the owners or intended occupants. "Low- and middle-income persons and families" means persons and families determined by a county or municipality (which determination shall be conclusive) to lack the financial ability to pay prices or rentals sufficient to induce private enterprise in such county or municipality to build a sufficient supply of adequate, safe, and sanitary dwellings without the special assistance afforded by this article;

(e) Sewage or solid waste disposal facilities;

(f) Facilities for the furnishing of water, if available on reasonable demand to members of the general public;

(g) Facilities for the furnishing of energy or gas;

(h) Sports and recreational facilities available for use by members of the general public either as participants or spectators and functionally related and subordinate residential housing facilities, including residential facilities, without regard to the limitations contained in paragraph (d) of this subsection (10), for employees of the persons or entities owning or operating such sports and recreational facilities and facilities located in proximity to and in connection with sports and recreational facilities providing treatment, therapy, or recreational opportunities for mentally an physically handicapped persons and families of such persons;

(i) Convention or trade show facilities;

Appendix D

(j) Airports, facilities for the loading or unloading of unprocessed agricultural products or raw materials, mass commuting facilities, railroad facilities, parking facilities, or storage or training facilities directly related to any of the foregoing;

(k) Research, product-testing, and administrative facilities; and

(l) Facilities for private institutions of higher education.

(10.5) "Refinance" or "refinancing" means the issuing of bonds by a county or municipality and the use of all or substantially all of the proceeds therefrom pursuant to a financing agreement with the user to liquidate any obligations previously incurred to finance or aid in financing of a project specified in paragraphs (b) to (l) of subsection (10) of this section which would constitute such a project had it been originally undertaken and financed by a county or municipality pursuant to this article. Title to or in the project may remain at all times in the user, and in such case, the bonds of the county or municipality may be secured by mortgage or other lien upon the project granted by the owner or by a pledge of one or more notes, debentures, bonds, or other secured or unsecured debt obligations of the user, as the governing body deems advisable.

(11) "Resolution" means a resolution of a county.

(12) "State means the state of Colorado.

(13) "User" means one or more persons who enter into a financing agreement with any county or municipality relating to a project; except that the user need not be the person actually occupying, operating, or maintaining the project.

Appendix D

(14) "Utility plant" means any facility used for or in connection with the generation, production, transmission, or distribution of electricity; the production, manufacture, storage, or distribution of gas; the transportation or conveyance of gas, oil, or other fluid substance by pipeline; or the diverting, developing, pumping, impounding, distribution, or furnishing of water.

* * *

29-3-104. General powers. (1) In addition to any other powers, each county and municipality has the following powers:

(a) To acquire, whether by construction, purchase, gift, devise, lease, or sublease; to improve and equip; and to finance, refinance, sell, lease, or otherwise dispose of one or more projects or part thereof. If a county issues revenue bonds as provided in this article to finance, refinance, or acquire projects, such projects shall be located within said county, or, if a municipality issues revenue bonds as provided in this article to finance, refinance, or acquire projects, such project shall be located within the municipality or within eight miles from the nearest point of its corporate limits.

(b) To enter into financing agreements with others for the purpose of providing revenues to pay the bonds authorized by this article; to lease, sell, or otherwise dispose of any or all of its projects to others for such revenues and upon such terms and conditions as the governing body may deem advisable; and to grant options to renew any lease or other agreement with respect to the project and to grant options to buy any project at such price as the governing body deems desirable;

(c) To issue revenue bonds for the purpose of defraying

the cost of financing, refinancing, acquiring, improving, and equipping any project, including the payment of principal and interest on such bonds for not exceeding three years, funding any reserve funds which the governing body may deem advisable to establish in connection with the retirement of the proposed bonds or the maintenance of the project, and all other incidental expenses incurred in issuing such bonds;

(d) To secure payment of such bonds as provided in this article.

(2) To further implement section 18 or article XIV of the state constitution and to supplement part 5 of article 25 of title 31, C.R.S., any county or municipality may delegate, by resolution or ordinance as the case may be, to any other county or municipality authority to act on its behalf in the financing, refinancing, acquisition, leasing, ownership, improvement, and disposal of projects. Any such delegation may be general or limited in scope and time and may be irrevocable for the term or terms of any financing agreement or bond issue, all as provided in said ordinance or resolution.

* * *

29-3-106. Form and terms of bonds — exemption from Colorado income tax. (1) The bonds shall be authorized by resolution of the county commissioners or by ordinance of the municipality; shall be subject to such maximum net effective interest rate; and shall be in such denominations, bear such date, mature at such time not exceeding forty years from their respective dates, bear such interest at a rate, be in such form, carry such registration privileges, be executed in such manner, be payable at such place within or without the state, and be

subject to such terms of redemption as the authorizing resolution or supplemental resolution of the county commissioners or the ordinance or supplemental resolution of the municipality may provide.

(2) The bonds may be sold in one or more series at par, or below or above par, at public or private sale, in such manner and for such price as the county or municipality, in its discretion, shall determine; but the county or municipality shall not sell such bonds at a price such that the net effective interest rate of the issue of bonds exceeds the maximum net effective interest rate authorized. As an incidental expense of the project, the county or municipality, in its discretion, may employ financial and legal consultants in regard to the financing of the project.

(3) The county or municipality may exchange all or a part of its bonds for all or an equivalent part of the project for which the bonds are issued, the exchange to be preceded by determination of the fair value of the project or part of the project exchanged for the bonds. Such determination shall be by ordinance of the municipality or by resolution of the governing body of the county and shall be conclusive.

(4) The bonds shall be fully negotiable under the terms of article 8 of title 4, C.R.S.

(5) Interest on bonds issued on or after July 1, 1979, pursuant to this article shall be exempt from Colorado income tax.

* * *

29-3-114. Financing of project. Prior to the issuance of any bonds authorized by this article, the county or municipality

shall enter into a financing agreement with respect to the project with a user providing for payment to the county or municipality of such revenues as, upon the basis of such determinations and findings, will be sufficient to pay the principal of and interest on the bonds issued to finance the project, to build up and maintain any reserves deemed advisable by the governing body in connection therewith, and to pay the costs of maintaining the project in good repair and keeping it properly insured, unless the financing agreement obligates the user to pay for the maintenance of and insurance on the project.

* * *

29-3-120. Payment in lieu of taxes. (1) Pursuant to section 4 of article X of the state constitution, all property owned by a county or municipality pursuant to this article shall be and remain exempt from taxation. Nevertheless, any county or municipality acquiring or extending any project as provided in this article shall annually pay, solely out of the revenues from the project and not from any other source, to the state of Colorado and to the city, town, school district, and any other political subdivision or public body corporate wherein such project is located, authorized to levy taxes, a sum equal to the amount of tax which the taxing entity would annually receive if the property were owned by any private person or corporation, any other statute to the contrary notwithstanding. . . .

* * *

APPENDIX E — EXCERPTS FROM COLORADO REVISED STATUTES §§ 41-3-101, *et seq.* AND 41-4-101, *et seq.* (PUBLIC AIRPORTS)

ARTICLE 3

Public Airport Authority Law

* * *

41-3-102. Legislative declaration. The purpose of this article is to authorize the creation by cities and towns, and counties, and the state of Colorado, through their joint action, and by counties acting by independent action or jointly with the state, of airport authorities, corporate and politic, and constituting political subdivisions of the state of Colorado, for the purpose of acquiring and improving airports, air navigation facilities, and related facilities, and the financing of the cost of such acquisition by the issuance of bonds or other obligations of such authorities payable from the income of any such authorities and otherwise secured to the extent permitted by law without the incurrence of an indebtedness by the state of Colorado, or by . . .

* * *

41-3-106. Powers of the authority. (1) An authority has the following powers:

* * *

(e) To borrow money and to issue bonds payable in whole or in part from the income of the authority and otherwise secured to the extent permitted by law; but, before any money shall be borrowed or any bonds issued, such borrowing or sale shall first be approved by the board of county commissioners of any county

independently creating an authority under the provisions of this article. Said bonds shall be authorized by resolution of said board without the necessity of submitting the question of their issuance to the qualified electors of the municipalities or counties constituting members of the authority. Said resolution shall prescribe the form of said bonds, the manner of their execution, which may be effected by the use of the facsimile signatures of the officers of the authority in accordance with the laws of the state in effect at the time of their execution, shall provide for the terms thereof, including the maximum net effective interest rate for the issue of bonds, and the security for their payment, may authorize the issuance of additional bonds having a lien on a parity with or junior thereto on the income of the authority, provide for the redemption of said bonds prior to their respective maturities with or without premium, and direct that said bonds shall be sold at public or private sale at or below par, but such bonds shall not be sold at a price such that the net effective interest rate of the issue of bonds exceeds the maximum net effective interest rate authorized. The board shall prescribe other details in connection with the issue of bonds. The bonds so authorized shall mature serially over a period of not exceeding thirty years and shall bear interest at a net effective interest rate not exceeding the maximum net effective interest rate authorized. Said resolution and bonds may also include such other terms or recitals which in the judgment of the board are necessary or proper to render the same marketable. Nothing in this article shall be construed as authorizing the authority or any county to assess and levy taxes for the payment of said bonds, nor shall said bonds be construed to be an indebtedness of the municipalities or counties constituting members of the authority or of the county independently creating such authority within the meaning of any constitutional, charter, or statutory limitation.

Appendix E

(f) To purchase, trade, exchange, acquire, buy, sell, and otherwise dispose of and encumber real and personal property of the authority and any interest therein, including leases and easements;

* * *

(i) To pledge all or a part of the income of the authority to the payment of the bonds authorized to be issued pursuant to the terms of this article and to otherwise secure the payment of said bonds to the extent permitted by law including, but not limited to, a conveyance in trust of any or all of the properties or facilities of the authority as a part of such security;

(j) To have and exercise the power of eminent domain in the manner provided by law for the condemnation of private property for public use and to take any property necessary to exercise the powers in this article granted, either within or without the boundaries of the municipalities or counties constituting members of the authority. In exercising the power of eminent domain, the procedure established and prescribed by articles 1 to 7 of title 38, C.R.S., shall be followed. Nothing in this article shall be construed to limit the power of a county otherwise to acquire property through the exercise of the power of eminent domain under and in accordance with the laws of the state.

(k) To construct and maintain works and establish and maintain facilities, within or without the boundaries of the municipalities or counties constituting members of the authority or within or without the boundaries of the county independently creating an authority pursuant to the provisions of this article, across or along any public street or highway or in, upon, under,

or over any vacant public lands, which public lands are now, or may become

* * *

(b) That bonds issued under this article and the income therefrom shall be free and exempt from taxation by the sate, or any political subdivision of the state, with the exception of transfer, inheritance, and estate taxes.

* * *

PART I

COUNTY AIRPORTS

41-4-101. Operation a governmental function. The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment, and operation of airports and other air navigation facilities; and the exercise of any other powers granted in this part 1 to any county, city and county, city, or town are hereby declared to be public governmental functions, exercised for a public purpose, and matters of public necessity; and such lands and other property, easements, and privileges acquired and used in the manner and for the purposes enumerated in this part 1 are hereby declared to be acquired and used for public purposes and as a matter of public necessity.

Appendix E

* * *

41-4-105. Authority to incur indebtedness. The board of county commissioners of any county, either acting singly or jointly with any other county, city and county, city, or town, has the power to incur indebtedness on its behalf for any of the purposes mentioned in this part 1 and to issue bonds for the acquisition, construction, and improvement of airports, landing fields, air navigation facilities, and airport protection privileges in the same form and manner as debt is incurred and bonds issued for other county purposes; except that such indebtedness may also be approved at a special election called for that purpose by the board of county commissioners, which election shall be conducted insofar as practicable in the manner set forth in section 30-26-101, C.R.S.

* * *

41-4-106. Operation of airports. In connection with the erection, maintenance, and operation of any such airport or navigation facilities, any county has the power and jurisdiction, when acting singly, or by agreement, when acting jointly with any other county, city and county, city, or town, to regulate the receipt, deposit, and removal and the embarkation of passengers or property to or from such airports; to exact and require charges, fees, and tolls, together with a lien to enforce their payment; to lease or assign for operation such space or area, appurtenances, appliances, or other conveniences necessary or useful in connection therewith; to own and operate aircraft; to employ pilots; to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport, landing field, and navigation facilities; to perform any duties necessary or

consistent for the regulation of air traffic; to enter into contracts or otherwise cooperate with the federal government or other public or private agencies; and to exercise such powers as may be required or consistent in the promotion of aeronautics and the furtherance of commerce and navigation by air.

* * *

Supreme Court, U.S.
FILED
SEP 22 1997
CLERK

No. 97-0133

In The

Supreme Court of the United States

October Term, 1996

DAVID CHARLES ZIMOMRA, On Behalf Of Himself And All Others Similarly Situated,

Petitioner,

vs.

ALAMO RENT-A-CAR, INC., AVIS, INC., BUDGET RENT A CAR CORPORATION, DOLLAR RENT-A-CAR SYSTEMS, INC., HERTZ CORPORATION, NATIONAL CAR RENTAL SYSTEM, INC., THRIFTY RENT-A-CAR SYSTEMS, INC., VALUE RENT-A-CAR, INC., ENTERPRISE LEASING CO. OF DENVER, NATIONAL CAR RENTAL, RESORT RENT-A-CAR, INC., STEAMBOAT SPRINGS RENTAL AND LEASING, INC., TRYND, INC., TIARA ENTERPRISES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TERENCE C. GILL
Counsel of Record
STEPHEN D. GURR
BROWNSTEIN HYATT FARBER & STRICKLAND, P.C.
Attorneys for Respondent Hertz Corporation
410 Seventeenth Street
22nd Floor
Denver, CO 80202
(303) 534-6335

Additional Counsel Continued

72040 (800) 3 APPEAL • (300) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

32pp

DENNIS A. GRAHAM
CLANAHAN TANNER DOWNING
& KNOWLTON, P.C.
Attorneys for Respondent
Alamo Rent-A-Car Inc.
1600 Broadway St., Suite 2400
Denver, CO 80202
(303) 830-9111

ROLIN P. BISSELL
JEANNETTE M. BRIAN
SCHNADER, HARRISON, SEGAL & LEWIS LLP.
1600 Market Street, Suite 3600
Philadelphia, PA 19103-7286
(215) 751-2000

WILLIAM A. BIANCO
DALE R. HARRIS
DAVIS, GRAHAM & STUBBS, LLP
370 17th Street, Suite 4700
P.O. Box 185
Denver, CO 80201-0185
(303) 892-9400

Attorneys for Respondent Avis, Inc.

ROBERT YOULE
AMY BENSON
WILLIAMS, YOULE & KOENIGS, P.C.
Attorneys for Respondent
Budget Rent A Car Corporation
1200 17th Street, Suite 1420
Denver, CO 80202
(303) 572-6700

BENJAMIN S. SHARP
PERKINS COIE
607 14th Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600

B. LAWRENCE THEIS
BOBBEE J. MUSGRAVE
PERKINS COIE
1675 Broadway, Suite 2800
Denver, CO 80202
(303) 571-6100

Attorneys for Respondent
Dollar Rent-A-Car Systems, Inc.

DAVID A. DONOHOE
SANFORD M. SAUNDERS, JR.
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000

ROBERT F. HILL
KAREN A. TOMB
HILL & ROBBINS, P.C.
100 Blake Street Building
1441 Eighteenth Street
Denver, CO 80202
(303) 296-8100

Attorneys for Respondent
National Car Rental System, Inc.

TERRY CALVANI
PILLSBURY MADISON & SUTRO
1100 New York Avenue, N.W.
9th Floor, East Tower
Washington, D.C. 20005
(202) 861-3000

MARTIN BEIER
LONG, STEESE, DeGARLAIS
& BEIER, P.C.
1050 17th Street, Suite 2350
Denver, CO 80265
(303) 572-9300

Attorneys for Respondent
Thrifty Rent-A-Car System, Inc.

CRAIG R. CARVER
ALFERS & CARVER, LLC
Attorneys for Respondent
Value Rent-A-Car, Inc.
730 17th Street, Suite 340
Denver, CO 80202
(303) 592-7674

ROBERT MATTHEWS
CHRISMAN, BYNUM & JOHNSON
Attorneys for Respondent
Tiara Enterprises, Inc.
1900 15th Street
Boulder, CO 80302
(303) 546-1300

JOHN MADDEN, III
JOHN MADDEN, IV
MADDEN & MADDEN
410 17th Street, Suite 530
Denver, CO 80202
(303) 436-1111

ROMAN WULLER
THOMPSON COBURN
1 Mercantile Center
St. Louis, MO 63101
(314) 552-6000

Attorneys for Respondent
Enterprise Leasing Co.

KENTON H. KUHLMAN
KUHLMAN & KUHLMAN
Attorneys for Respondent
Steamboat Springs Leasing, Inc.
5290 DTC Parkway Suite 170
Englewood, CO 80111
(303) 770-6664

DAVID D. SCHLACHTER
TILLY & GRAVES
Attorneys for Respondent
Trynd, Inc.
3773 Cherry Creek North Drive
Denver, CO 80209
(303) 321-8811

JEFFREY J. COWMAN
SMITH McCULLOUGH, P.C.
Attorneys for Respondent
Resort Rent-A-Car, Inc.
4643 S. Ulster, Suite 900
Denver, CO 80237
(303) 221-6000

GREGORY B. KANAN
MICHAEL D. PLACHY
ROTHGERBER, APPEL, POWERS
& JOHNSON LLP
Attorneys for Respondent
National Car Rental, Inc.
1200 17th Street, Suite 3000
Denver, CO 80202
(303) 623-9000

QUESTIONS PRESENTED FOR REVIEW

1. Was the Tenth Circuit Court of Appeals correct in ruling that petitioner's antitrust claim, based solely on the requirement that he pay a uniform $2.98 "Usage Fee" as mandated by the City and County of Denver's Municipal Ordinance No. 863 (the "Bond Ordinance"), is barred by the state action immunity doctrine?

2. Was the Tenth Circuit Court of Appeals correct in ruling that the respondent car rental companies' alleged conduct of petitioning the City and County of Denver to establish and set the Usage Fee by enacting the Bond Ordinance is immune from antitrust liability under the *Noerr-Pennington* doctrine?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceedings.

Each respondent corporation lists its parent companies and non-wholly owned subsidiaries as follows:

Alamo Rent-A-Car, Inc.: None

Avis Inc.: HFS Incorporated; HFS Car Rental Holdings Inc.; HFS Car Rental Inc.; AESOP Leasing, L.P.; and AESOP Funding, II, LLC.

Budget Rent a Car Corporation: Budget Group, Inc.

Dollar Rent-A-Car Systems, Inc.: Dollar Rent A Car Systems, Inc., successor to Dollar Systems, Inc.; Pentastar Transportation Group, Inc.; Chrysler Corp.

Hertz Corporation: Ford Motor Company

National Car Rental System, Inc.: GM Holding Co.; General Motors Corporation

Thrifty Rent-A-Car: Chrysler Corporation; Pentastar Transportation Group, Inc.; Thrifty Rent-A-Car System, Inc.; Thrifty Car Rental Finance Corp.; Kam Cars of America, Inc.; Tartan, Inc.; TRAC Asia Pacific, Inc.; Wizer, Inc. of Phoenix; Thrifty Europe, S.A.; Thrifty Rent-A-Car Ltd. (U.K.); Thrifty Rent-A-Car Ltd. (Ireland); Thrifty Rent-A-Car Ltd. (New Zealand); Thrifty Rent-A-Car Ltd. (Scotland); Thrifty Canada, Ltd.; Kingmill Pty Limited; 840954 Ontario Ltd.

Value Rent-A-Car, Inc.: Mitsubishi Motor Sales of America, Inc.

Enterprise Leasing Co., of Denver: Enterprise Rent A Car Company

National Car Rental, Inc.: None

Resort Rent-A-Car, Inc.: None

Steamboat Springs Rental and Leasing, Inc. dba Advantage Rent-A-Car: Southwest-Tex Leasing Co., Inc.

Trynd, Inc.: GM Holding Co.; General Motors Corporation; Dollar Rent-A-Car Systems, Inc.; Pentastar Transportation Group, Inc.; Chrysler Corp.

Tiara Enterprises, Inc.: None

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	v
Table of Citations	v
Statement of the Case	1
A. Introduction	1
B. Plaintiff's Allegations	2
C. Denver's Bond Ordinance	3
D. Proceedings In The Courts Below	5
Reasons for Denying the Writ	7
I. The Tenth Circuit Was Correct In Applying The State Action Analysis Adopted By This Court In *Town Of Hallie*.	7
II. The Tenth Circuit Correctly Concluded That The Statutory Authority Behind The Denver Bond Ordinance Satisfied The Clear Articulation Prong.	13
III. The Petition Should Be Denied Because The *Noerr-Pennington* Doctrine Bars Petitioner's Claims.	16

Contents

		Page
A.	Respondents' Alleged Conduct Was Protected Under *Noerr-Pennington*.	16
B.	Respondents' Alleged Conduct Did Not And Cannot Cause Petitioner's Alleged Injury.	18
Conclusion		19

TABLE OF CITATIONS

Cases Cited:

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 18

Associated Gen. Contractors of Calif., Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) .. 3

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980) 7, 8

City of Columbia v. Omni Outdoor Adv., Inc., 499 U.S. 365 (1991) 2, 9, 10, 11, 12, 13, 14

Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) ..... i, 1, 5, 7, 16, 17, 18, 19

Federal Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621 (1987) 9, 10

Hoover v. Ronwin, 466 U.S. 558 (1984) 11

Contents

	Page
J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981)	19
Parker v. Brown, 317 U.S. 341 (1943)	5
Patrick v. Burget, 486 U.S. 94 (1988)	9
Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985)	9
324 Liquor Corp. v. Duffy, 479 U.S. 335 (1986)	8
Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)	2, 5, 7, 9, 10, 14
United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965)	i, 1, 5, 7, 16, 17, 18, 19
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	19
Statutes Cited:	
C.R.S. § 29-3-101 *et seq.*	14
C.R.S. § 41-4-101 *et seq.*	15
C.R.S. § 41-4-102 *et seq.*	14
C.R.S. § 41-4-106	14, 15
15 U.S.C. § 1 (1995)	1

Contents

Page

Rules Cited:

Fed. R. Civ. Proc. 12(b)(6) 5

Supreme Court Rule 10 1

STATEMENT OF THE CASE

A. Introduction

The petition for writ of certiorari should be denied. The Tenth Circuit's decision neither creates an inter-circuit conflict nor decides a novel issue of law. Petitioner thus raises no basis warranting the grant of certiorari review of the decision. Petitioner's sole argument is that the Tenth Circuit misapplied this Court's case law. This is rarely a basis for granting certiorari (*see* Supreme Court Rule 10) and, even if it were, petitioner fails to present an issue for this Court's consideration because the Tenth Circuit's decision falls squarely within this Court's numerous state action and *Noerr-Pennington* decisions.

Petitioner's two complaints challenged a requirement that he pay a $2.98 Usage Fee for each day that he rented a car at Stapleton International Airport (now Denver International Airport ("DIA")) in Denver, Colorado. Petitioner contends that the Usage Fee is the result of an agreement to fix prices among the respondent car rental companies in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1995). The collection of the Usage Fee by respondents is in fact mandated by a Denver municipal ordinance.

Under Municipal Ordinance No. 863 (the "Bond Ordinance")[1], Denver issued municipal bonds ("Airport Bonds") to finance the construction of car rental facilities at DIA, which Denver owns and leases to each car rental company. The Bond Ordinance compels each car rental company operating at DIA to collect from its customers a $2.98 per day Usage Fee and deliver these fees to the City's collection agent for repayment of the Airport Bonds.

---

1. Both the District Court and the Court of Appeals took judicial notice of the Bond Ordinance and petitioner does not object to these actions.

The Tenth Circuit correctly held that the establishment and collection of the Usage Fee was immune from antitrust liability under the state action doctrine because it was mandated by the Bond Ordinance: Denver was authorized under a series of Colorado statutes to enact a financing ordinance that required the respondents to collect a Usage Fee from their customers and it was a foreseeable consequence of that authority to mandate the collection of fees that competition could be affected. *See City of Columbia v. Omni Outdoor Adv., Inc.*, 499 U.S. 365 (1991). Moreover, the "active state supervision" prong of the state action test did not apply because the Usage Fee was explicitly established and set at $2.98 by Denver in its Bond Ordinance, leaving no private conduct to supervise. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

The Tenth Circuit's ruling simply reflects the application of well established case law to a set of unremarkable facts. The Bond Ordinance and its Usage Fee are no different from dozens of municipal ordinances such as city sales and use tax laws that compel private parties to collect revenues for municipal purposes. In each such instance a municipality compels and in a sense regulates private persons, but in none does it authorize those persons to engage in private anticompetitive conduct that requires supervision. Thus, petitioner's request for review by this Court should be denied because the court below correctly applied established law.

B. Plaintiff's Allegations

Petitioner's two complaints, read in conjunction with Denver's Bond Ordinance, allege facts very different from the inaccurate picture presented by his petition for certiorari. The District Court and the Court of Appeals correctly relied on the facts *as alleged* and as presented on the face of the Bond Ordinance. Respondents submit that the statement of facts in

the Tenth Circuit's opinion is correct, and that extraneous allegations in the petition should be ignored. *See Associated Gen. Contractors of Calif., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983) (on certiorari review of order granting a motion to dismiss antitrust claims, "it is not . . . proper to assume" that petitioner "can prove facts that [he] has not alleged.").

In his complaints, petitioner alleges that the respondent car rental companies: (1) agreed among themselves to impose a uniform additional charge of $2.98 per day on their customers, (2) entered into this agreement "without the participation or knowledge of the City of Denver", and (3) petitioned the City of Denver for the passage of the Bond Ordinance requiring the collection of the Usage Fee, which Bond Ordinance was ultimately passed. Petitioner did not allege that any car rental company charged the Usage Fee prior to the effective date of the Bond Ordinance. Accordingly, petitioner's payment of the Usage Fee was pursuant to the Bond Ordinance.

C. Denver's Bond Ordinance

The Bond Ordinance authorized Denver to construct a series of car rental facilities on city-owned land at DIA and issue $65,579,000 in Airport Bonds. To repay the Bonds, the Bond Ordinance required each rental company tenant to enter a Special Facilities and Ground Lease with the City of Denver pursuant to which:

> *a Usage Fee shall be charged and collected by each Company* from the person entering into each motor vehicle rental agreement with the Company . . . . *The amount of the Usage Fee* for the period from the date of issuance of the [Airport] Bonds to October

> 1, 1994 *shall be $2.98* per transaction day and shall be the same in each Special Facilities Lease.

Bond Ordinance § 3.4(a) (emphasis added).

The Usage Fee is pledged by the City as security for the Airport Bonds. Bond Ordinance ¶ 8. To effectuate that pledge, the Bond Ordinance provides that the car rental companies must deposit the Usage Fee in a Special Facilities Revenue Fund maintained with the City's paying agent. Bond Ordinance § 3.4(a). The Paying Agent is required to use these monies to pay the interest and principal due on the Airport Bonds. Bond Ordinance § 3.1(b).

The Bond Ordinance specifically set the Usage Fee at $2.98 per transaction day. Bond Ordinance § 3.4(a). The Bond Ordinance appoints David M. Griffith and Associates as Denver's "Independent Consultant" charged with making any needed adjustment of the Usage Fee for future years.[2] Any replacement of the Independent Consultant is subject to the review and approval of the City. Bond Ordinance § 1.3. If the usage fee were to be changed — and it never has — the Independent Consultant would be required to calculate the fee using a prescribed formula set out in the Bond Ordinance. Bond Ordinance § 3.4(b). Although the car rental companies may comment on the determination of the Usage Fee, they have no control over it. Bond Ordinance § 3.4(c).

---

2. The Usage Fee has remained at $2.98 since its inception and petitioner does not allege otherwise. Therefore, the only conduct at issue is the charging of the fee initially set by the Ordinance.

D. Proceedings In The Courts Below

Respondents filed motions to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that the required collection of the Usage Fee was exempt from the federal antitrust laws under the state action doctrine recognized in *Parker v. Brown*, 317 U.S. 341 (1943), and that respondents' conduct was protected by the *Noerr-Pennington* doctrine. The District Court granted respondents' motions to dismiss. Pet. App. A, p. 38a.

The Tenth Circuit affirmed the District Court's ruling. Applying this Court's decision in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Tenth Circuit first concluded that Denver's Bond Ordinance satisfied the clear articulation prong of the state action test:

> [I]t is clear the City and County of Denver had authority, pursuant to C.R.S. § 41-4-106, to require defendants to impose the daily usage fee on their car rental customers. As we noted in *Allright* [*Colorado, Inc. v. City and County of Denver*, 937 F.2d 1502 (10th Cir.), *cert. denied*, 502 U.S. 983 (1991)], 41-4-106 gives . . . Denver authority "to regulate the receipt, deposit, and removal and the embarkation of passengers . . . to or from" both Stapleton and DIA, "to exact and require charges, fees, and tolls," . . . . [T]his is precisely what the City and County of Denver did when it enacted the daily usage fee. Further, as in *Allright*, it is reasonably foreseeable that implementation of such authority could displace competition in the area of car rental services.

Pet. App. A, pp. 17a-18a.

Next, the Tenth Circuit concluded that the active state supervision prong of the test need not be applied because the City of Denver set the Usage Fee when it passed the Bond Ordinance, and respondents had no control over it:

> We agree with defendants that state action immunity in this case is properly determined according to the *Town of Hallie* test. In *Patrick* [*v. Burget*, 486 U.S. 94 (1988)], the Supreme Court noted the active supervision prong of the *Midcal* test "requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." 486 U.S. at 101. Such active state review is clearly necessary where private defendants are empowered with some type of discretionary authority in connection with the anticompetitive acts (e.g., to determine price or rate structures). *Here, however, the named defendants have no such discretionary authority. Rather, the provisions of Ordinance 863 make clear that the City and County of Denver is the "effective decision maker" with respect to both the amount of the daily usage fee and imposition of the fee.* [citation omitted] . . . In our view, application of the active supervision prong is of little value under these circumstances because the challenged conduct is mandated and strictly controlled by the City and County of Denver via Ordinance 863.

Pet. App. A, pp. 9a-10a (emphasis added). Thus, the Tenth

Circuit concluded that because the amount of the Usage Fee was set by the City of Denver and not by respondents, there is no private anticompetitive conduct to supervise. The Tenth Circuit also ruled that respondents' conduct was protected by the *Noerr-Pennington* doctrine. Pet. App. A, pp. 18a-19a.

REASONS FOR DENYING THE WRIT

I.

THE TENTH CIRCUIT WAS CORRECT IN APPLYING THE STATE ACTION ANALYSIS ADOPTED BY THIS COURT IN *TOWN OF HALLIE*.

Petitioner's principal argument is that the Tenth Circuit should not have afforded respondents state action immunity because the Bond Ordinance "involved" or "regulated" private parties and, therefore, both the "clear articulation" and the "active supervision" prong of the state action test were required. This Court, however, has never adopted such a vague and inherently unworkable standard. Instead, the Court's state action decisions have established a clear demarcation between situations in which active supervision is required and those where it is not.

Since adopting the two-part state action test, this Court has been careful to distinguish between anticompetitive restraints resulting from the activities of private parties and those imposed by the sovereign itself through legislation. In the former situation, the Court has consistently imposed a two-part requirement for conferring state action immunity: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised by the state itself.' " *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105

(1980). In the latter situation, however, the Court has with equal consistency held that active supervision was not required for the simple reason that the statute did not authorize *private parties* to engage in any anticompetitive conduct needing supervision.

For example, in *Midcal*, the Court reviewed a California statute authorizing *private wine growers* to set the prices at which wine could be resold by retailers. *Id.*, 445 U.S. at 99. As the statute in question expressly authorized private parties to engage in anticompetitive conduct, the Court applied the two-part test and required active supervision of the private price setting activity. At the same time, however, the Court was careful to distinguish the facts in *Midcal* from a situation where the challenged restraint is imposed by the sovereign itself through its own legislation:

> The State simply authorizes price setting and enforces the prices established by private parties. *The State neither establishes prices* nor reviews the reasonableness of the price schedules . . . .

Id. at 105 (emphasis added). *See also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6, 345 (1986) (striking similar legislation on the ground that it "neither establishes prices nor reviews [their] reasonableness" but indicating that "[a] simple 'minimum markup' statute requiring retailers to charge 112 percent of their actual wholesale cost" may satisfy the "active supervision" requirement). The Court in *Midcal* and *324 Liquor Corp.* offered the sovereign a choice: to obtain state action immunity, the sovereign could either establish prices itself in its legislation or it could authorize private parties to set prices. In this latter case, however, the sovereign could authorize the setting of prices only on the condition that it actively supervised the authorized private anticompetitive conduct.

This Court has consistently distinguished between the sovereign establishing the restraint itself and the sovereign authorizing private parties to do so in every case relied upon by petitioner. Each case makes it clear that active supervision is required only when the sovereign authorizes or compels private parties to engage in conduct that would otherwise be an antitrust violation. *See Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 57 (1985) ("the State must supervise actively any *private anticompetitive conduct.*"); *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (the active supervision prong "requires that state officials have and exercise power to review *particular anticompetitive acts of private parties* and disapprove those that fail to accord with state policy."); *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992) ("A state law . . . cannot be the basis for antitrust immunity unless . . . the State provides active supervision of anticompetitive conduct *undertaken by private actors.*") (all emphasis added).

In contrast to cases such as *Southern Motor Carriers*, *Patrick* and *Ticor* in which the sovereign delegated to private parties the authority to adopt anticompetitive restraints, are the Court's decisions in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) and *City of Columbia v. Omni Outdoor Adv., Inc.*, 499 U.S. 365 (1991) in which the challenged restraints were imposed by *local governments*, acting pursuant to state policy. In both cases the Court found it unnecessary to require active supervision of private conduct because it was clearly the sovereign that was the effective decision maker.

In *Town of Hallie*, several Wisconsin towns sued the City of Eau Claire alleging that the city had illegally extended its monopoly over sewage treatment services. The Court, after finding that the City of Eau Claire's conduct was clearly authorized under Wisconsin law (thus satisfying the clear articulation prong of the two-part test), concluded that the

conduct of municipalities need not be actively supervised to benefit from state action immunity. *Town of Hallie,* 471 U.S. at 46. This conclusion, that the conduct of municipalities of enacting anticompetitive legislation need not be actively supervised, simply accorded to municipalities that which was already true of states: when the sovereign itself (the state, or a local government acting pursuant to the state's policy) enacts a restraint on trade, it need not comply with the active supervision requirement. *Id.*

The Court confirmed this rule in *City of Columbia* where the City of Columbia had passed a zoning ordinance restricting the size and location of billboards and allegedly restrained trade in that market. As in *Town of Hallie*, the Court only found it necessary to apply the clear articulation prong of the state action test. *City of Columbia*, 499 U.S. at 370-75. Significantly, as is the case here, the plaintiff had contended that the City of Columbia enacted the zoning ordinance in response to the request of a private party. Indeed, the jury in that case had concluded that the ordinance was "enacted pursuant to an agreement between city officials and a private party to restrict competition." *Id.* at 393 (Stevens, J., dissenting). Nevertheless, in spite of the fact that a private party was "involved" in actually instigating the enactment of the ordinance and that the ordinance "regulated" private conduct, this Court did not require active supervision because the challenged restraint was clearly imposed by the City of Columbia through its passage of the zoning ordinance, leaving no private conduct to supervise.

Petitioner confuses these distinct lines of cases when he contends that the Tenth Circuit should have gone behind the Bond Ordinance to determine whether Denver's legislative body adequately reviewed the reasonableness of the Usage Fee prior to enacting it as law. *See, e.g.*, Petition, p. 3. Unlike cases such as *Ticor* where private parties set the prices at issue which

automatically became law unless a state agency intervened, here as in *City of Columbia*, the challenged restraint is solely the result of Denver's decision to enact the Bond Ordinance. By asking the Court to second guess the decision of the Denver City Council in passing the Bond Ordinance, petitioner asks the Court to engage in:

> the sort of deconstruction of the governmental process and probing of the official "intent" that we have consistently sought to avoid. "[W]here the action complained of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action."
>
> . . .
>
> For these reasons, we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns. . . .

City of Columbia, 499 U.S. at 377-379 (quoting *Hoover v. Ronwin*, 466 U.S. 558, 579-580 (1984)).

At bottom, petitioner here questions the wisdom of the Denver Bond Ordinance and the role of respondents in its enactment. Similarly, in *City of Columbia*, the Court was invited to go behind the city's zoning ordinance to determine whether the City had acted properly in passing that law. As it did in *City of Columbia*, the Court should reject "any interpretation of the Sherman Act that would allow plaintiffs to look behind" Denver's actions. *Id.*

Finally, petitioner's proposed rule requiring active supervision any time private parties are "involved" or are "regulated," as opposed to the current rule under which active supervision is required only where the sovereign authorizes private parties to engage in anticompetitive conduct, is unworkable and nonsensical. Virtually every law involves or regulates private parties in one way or another. For example, under Denver's zoning laws, competitors are limited as to the locations of their businesses or products (newcomers may even be prevented from locating in the relevant market). Under Denver's sales tax laws, competitors are compelled to collect from their customers a uniform surcharge, exactly as the respondents are required to do with the Usage Fee. Under Colorado's liquor laws, stores are barred from competing on Sundays and numerous competitors such as supermarkets are barred altogether. No one would reasonably argue that simply because private parties were "involved" in or are "regulated" by these statutes compliance with these laws will subject them to antitrust liability unless their conduct is actively supervised! Yet this is exactly what petitioner contends in his brief.

The flaw in petitioners' argument is that while all of these laws regulate private parties and, as in *City of Columbia*, private parties may well have been "involved" in their passage by petitioning for them, none of these laws authorizes *private parties* to engage in conduct that violates the antitrust laws. Similarly, respondents' compliance with the Bond Ordinance need not be actively supervised since, like these examples, the Bond Ordinance does not authorize respondents to engage in any illegal anticompetitive conduct such as price fixing.

II.

THE TENTH CIRCUIT CORRECTLY CONCLUDED THAT THE STATUTORY AUTHORITY BEHIND THE DENVER BOND ORDINANCE SATISFIED THE CLEAR ARTICULATION PRONG.

Petitioner's contention that the Tenth Circuit erroneously applied the clear articulation prong of the state action immunity test to the Bond Ordinance is premised entirely on an incorrect characterization of the Court's clear articulation standard. Specifically, petitioner's contention that respondents must show that the state of Colorado explicitly "contemplated" that cities would control the prices charged by car rental companies, Petition, p. 15, was rejected by this Court in *City of Columbia*:

> The dissent contends that, in order successfully to delegate its Parker immunity to a municipality, a State must expressly authorize the municipality to engage (1) in specifically "economic regulation," . . . (2) of a specific industry . . . . These dual specificities are without support in our precedents, for the good reason that they defy rational implementation.
>
> . . .
>
> If, by authority to engage in specifically "economic" regulation, the dissent means authority specifically to regulate competition, we squarely rejected that in *Hallie v. Eau Claire* . . . .

City of Columbia, 499 U.S. at 373 n.4.

In contrast to petitioner, the Tenth Circuit relied on this Court's decisions in *Town of Hallie* and *City of Columbia* where the Court ruled that clear articulation is demonstrated when "suppression of competition is the 'foreseeable result' of what the statute authorizes." *City of Columbia*, 499 U.S. at 373. In applying this standard, the Tenth Circuit reviewed numerous statutes, including the Colorado County and Municipality Development Revenue Bond Act, C.R.S. § 29-3-101 *et seq.* and C.R.S. § 41-4-102 *et seq.* These statutes authorize municipalities and counties (Denver is both a city and a county) to erect airports, issue bonds and enter into arrangements for the repayment of those bonds. The Tenth Circuit particularly relied on C.R.S. § 41-4-106 which provides that counties have the power, in connection with the erection, maintenance, and operation of any airport:

> to regulate the receipt, deposit, and removal and the embarkation of passengers or property to or from such airports; *to exact and require charges, fees, and tolls* . . . to lease or assign for operation such space or area . . . necessary or useful in connection therewith; . . . to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport . . . .

C.R.S. § 41-4-106 (emphasis added). Based on these statutes, the Tenth Circuit correctly concluded that the collection of the Usage Fee was a "foreseeable result" of what the statutes authorized. Pet. App. A, pp. 12a-18a.

Petitioner attempts to avoid this case law by contending that the Bond Ordinance sets prices for car rentals, and that,

therefore, the relevant state statutes must expressly authorize such price setting. Petition, pp. 15-16. The response to this contention is simple: The Bond Ordinance does not set vendor prices. All that the Bond Ordinance requires of the car rental companies is that they collect from each customer a $2.98 Usage Fee and pay it over to the City's collection agent. The Ordinance says nothing about the prices the rental car companies must charge their customers. The rental car companies remain free to charge whatever price they choose. The Usage Fee is no different from Denver's uniform city sales tax that the rental car companies also must charge their customers. As with the Usage Fee, Denver's requirement of a sales tax is in no way a control of prices; it is a "fee or toll" collected on behalf of the City.

Petitioner next argues that C.R.S. § 41-4-106 only authorizes collection of "fees and tolls" by Denver itself and not by private companies such as respondents. This contention finds no support in the statutes. Nothing in Colorado's statutes even remotely suggests that Denver cannot mandate that private parties collect tolls and fees on its behalf. To the contrary, that is exactly what Denver is doing and has done for decades when it mandates the collection of the city sales tax by private companies from their customers. Petitioner's strained argument would render any toll, fee or tax arrangement imposed by a city or state a violation of the antitrust laws.

Perhaps realizing the futility of arguing that the relevant statutes did not authorize Denver to charge a Usage Fee, petitioner next complains that the Bonds are not tax exempt and therefore not authorized under the cited statutes. This argument was not raised below and, in any event, is wrong. C.R.S. § 41-4-101 *et seq.*, which authorizes the City to issue bonds, does not require bonds to be exempt from tax, but expressly authorizes the City "*to exact and require charges, fees, and tolls.*" C.R.S. § 41-4-106 (emphasis added).

III.

THE PETITION SHOULD BE DENIED BECAUSE THE *NOERR-PENNINGTON* DOCTRINE BARS PETITIONER'S CLAIMS.

Petitioner's emphatic objection that "[t]he *Noerr-Pennington* doctrine has nothing to do with this case". Petition, p. 20, constitutes the fundamental and pervasive flaw in petitioner's case: *every* aspect of the respondents' alleged conduct is protected by the *Noerr-Pennington* doctrine.

A. Respondents' Alleged Conduct Was Protected Under *Noerr-Pennington.*

The sole basis of petitioner's antitrust claim is the allegation that respondents met and agreed to the Usage Fee and then petitioned the City of Denver to pass an ordinance requiring it. Assuming the truth of this allegation, this is precisely the sequence of events that is addressed by the *Noerr-Pennington* doctrine: concerted efforts by competitors to achieve anticompetitive ends through the actions of government.

Petitioner appears to argue that the alleged agreement to charge a uniform Usage Fee can be isolated from the admittedly exempt concerted lobbying conduct and resulting Bond Ordinance. Petition, p. 20. Such a distinction finds no support in common sense or in this Court's *Noerr-Pennington* decisions. It is impossible for two persons to engage in concerted lobbying to obtain desired government action without first coming to an agreement to do so. Petitioner's suggestion that the *Noerr-Pennington* doctrine protects only the concerted lobbying effort but not the prior agreement to engage in such lobbying would render the doctrine senseless and hollow.

Of course, the *Noerr-Pennington* doctrine exempts not merely lobbying conduct but also agreements among private parties to restrain trade when the anticompetitive restraint complained of results from government action. As this Court stated in *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961):

> [W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out . . . .
>
> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

Id. at 136.

This principle was followed in *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965), where a miners' union and a number of large mining companies agreed among themselves to petition the Secretary of Labor for a minimum wage so high that small companies would be unable to compete. Their subsequent joint petitioning effort was successful. This Court found that such concerted activity, *regardless of its anticompetitive purpose*, was protected, under *Noerr*, from antitrust scrutiny. *Id.* at 670.

In reaching this conclusion in *Pennington*, this Court did not distinguish between the prior agreement of the parties to set a minimum wage and the subsequent act of petitioning jointly

for legislation to achieve that goal. Instead, this Court held that all of the activities were protected. *Id.* Thus, petitioner attempts to dissect the "prior agreement" from the subsequent petitioning conduct in a way that this Court never intended.

B. Respondents' Alleged Conduct Did Not And Cannot Cause Petitioner's Alleged Injury.

Finally, petitioner's efforts to distinguish respondents' alleged agreement to charge a Usage Fee from the resulting lobbying for and enactment of the Bond Ordinance fail for a different reason: petitioner has not and cannot allege any harm resulting from this alleged agreement. The only harm alleged in either complaint is the requirement to pay the $2.98 Usage Fee. However, because the Usage Fee *is required by Denver's Bond Ordinance* and petitioner is required under the Ordinance to pay the Usage Fee regardless of the existence of any alleged conspiracy among respondents, petitioner has failed to allege how such a conspiracy caused him or anyone else any injury.

Since the alleged agreement to fix prices is not the source of his harm, petitioner has no basis to assert an antitrust claim:

> "[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499 (1988) (quoting *Noerr*). In reaching this conclusion in *Allied Tube*, the Court simply reaffirmed the very basic principle of antitrust law that a private plaintiff can only recover damages *proximately caused* by the alleged anticompetitive conduct. *See*

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969) (to prevail on an antitrust claim, plaintiff must prove "some damage flowing from the unlawful conspiracy."); *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981) ("plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent."). Thus, even assuming that respondents' alleged conduct of entering into an agreement to fix prices was not protected petitioning conduct, petitioner's claim is nevertheless barred by *Noerr* and its progeny because the cause of his injury is the Denver Bond Ordinance, not the alleged agreement.

CONCLUSION

The Tenth Circuit's decision falls squarely within the Court's numerous state action and *Noerr-Pennington* decisions. Moreover, the lower court's decision does not represent a split among the federal circuits. There is nothing in this case that even suggests the existence of a novel issue or a departure from this Court's substantial body of state action precedent. Accordingly, respondents respectfully submit that the petition for certiorari be denied.

Respectfully submitted,

TERENCE C. GILL
Counsel of Record
STEPHEN D. GURR
BROWNSTEIN HYATT FARBER
& STRICKLAND, P.C.
Attorneys for Respondent
Hertz Corporation
410 Seventeenth Street
22nd Floor
Denver, CO 80202
(303) 534-6335